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United States Election Assistance Commission – Board of Advisors Meeting

Meeting Minutes – April 27-28, 2005

Herewith are the Minutes of the meeting of the United States Election Assistance Commission (EAC) Board Of Advisors held on Wednesday, April 27, through Thursday, April 28, 2005. The meeting convened on April 27 at 8:30 a.m. in Cambridge, Massachusetts at the Marriott Boston Cambridge Hotel, 2 Cambridge Center and adjourned at 12:41 p.m. on April 28, 2005.

Call to Order: Chair Lewis called the meeting to order at 8:30 a.m.

Roll Call:

Chair Lewis called the roll and found present Secretary Chris Nelson, Ms. Mary Herrera, Secretary Mary Kiffmeyer, Secretary Rebecca Vigil-Giron, Mr. Tom Wilkey, Ms. Wendy Noren, Ms. Helen Purcell, Ms. Beverly Kaufman, Mr. David Orr, Mr. Tony Sirvello, Mr. J.R. Harding, Mr. Noel Hillman, Mr. Hans von Spakovsky, Ms. Polli Brunelli, Mr. Wesley Kliner, Mr. Thomas Shortbull, Mr. Joseph Crangle, Ms. Sue Sautermeister, and Secretary Robin Carnahan. Chair Lewis also recognized that Mr. Jim Dickson and Mr. Christopher Thomas were not present at roll call, but were scheduled to arrive later in the day.

Changes in Agenda: Chair Lewis asked that the Board not take any official votes until they adopted a set of bylaws in the following day's business session. He then announced that the EAC Commissioners' Q and A session would be moved to 8:30 AM the following day.

Updates and Reports: Chair Lewis asked each member to describe a few concerns they wished to address. The members raised concerns in an effort to improve the development process of the Voluntary Voting Systems Guidelines (VVSG). Amongst the various concerns raised were members' desires to discuss and integrate public comment into the process; concerns regarding the states' lack of guidance in acquiring systems prior to the release of the final voting systems guidelines; the development of Board of Advisors bylaws; means to improve voter registration systems and reduce voter fraud; and various other obstacles facing EAC, State and local election officials in administering the mandates set forth in HAVA.

EAC Update: Thereafter, Chair Lewis introduced EAC Chair Hillman, who provided the Board with an update on EAC. EAC Chair Hillman gave a brief

summary of the challenges facing EAC, as well as milestones from the previous year, including its move in April 2004 to its new office space at 1225 New York Avenue, the publication of State plans, disbursements of requirements payments to States and issuance of best practices

payments being EAC EAC Chair Hillman went onto to discuss the schedule of

made to the states. She noted that Alaska, Guam and New York had not yet received any Title II payments because they had not met the administrative complaints procedures or five percent matching requirements, mandated by HAVA. Additionally, she noted the schedule of 2005 meetings and discussed EAC's intention to hold public hearings in the field.

EAC EAC Chair Hillman then reported on EAC's success in obtaining an increase in its 2005 budget to \$10 million for its operating budget and \$4 million for research projects. These increases allowed EAC and the Technical Development Guidelines Committee (TGDC) to move forward with the National Institute of Science and Technology (NIST) on the development of the Voluntary Voting System Guidelines (VVSG). EAC EAC Chair Hillman indicated that of this \$14 million budget, approximately half is devoted including the development of guidance and VVSG. EAC's fiscal year 2006 budget request is approximately \$17 million.

Furthermore, EAC EAC Chair Hillman discussed the FY 2005 cap of 22 full-time employees and EAC's efforts for FY 2006 to have that number increased to 26, so that EAC may properly take over lab accreditation, voting system certification and the ongoing review and auditing of all state reports. EAC has decided to contract out a lot of the work it could do internally if it had more staff. Chair Hillman then described how the budget request process works.

EAC EAC Chair Hillman then told the Board that the Commissioners would receive recommendations from the Technical Guidelines Development Committee (TGDC) by May 9th. Thereafter, the guidelines will be posted for public comment for 90 days, at the end of which, EAC will make changes to the VVSG as appropriate. During the comment period, EAC plans to hold 3 public hearings. The entire process should take approximately 120 days and is required by HAVA.

EAC EAC Chair Hillman provided a summary of the research and study projects EAC is working on, including issuing guidance on provisional voting, the impact of voter ID requirements, issuing statewide voter registration database guidance, studying and surveying Election Day 2004, UOCAVA, and NVRA as required under HAVA. The Election Day study will establish baseline information and statistics for further study and comparison. In addition, EAC will do a study on electronic voting and a report on Free Absentee Ballot Postage some time in the near future.

EAC EAC Chair Hillman stated that all EAC meetings, including those of the Board of Advisors and Standards Board, are open to the public. General Counsel Juliet Thompson stated that the Board would be able to have telephonic meetings concerning upcoming studies as long as they are published.

Mr. Noel Hillman stated his concern that EAC does not yet have an Inspector General to oversee the process of disbursing funds and offered his help in securing Inspector General services for EAC. EAC EAC Chair Hillman stated that the Commission has been working to establish a cooperative relationship with another agency for the use of Inspector General services and they are close to establishing such a relationship. Commissioner Soaries added that they are aware of the need to secure such services.

Commissioner Martinez commented on the interface between the Single State Audit Act and the duties of the Inspector General and stated that the Commissioners recently received guidance from GAO. In addition the Comptroller General has an obligation to audit funds at least once during the life of the funds.

Commissioner Martinez further commented that although the Commission reviewed the state plans that were submitted, its due diligence is limited to certification that a state had received a Title II payment, had filed a state plan published in the Federal Register, had an administrative complaint procedure in place, and had put up a 5 percent match. EAC will rely on the states to inform itself when it makes a material change to its plan, but will also perform audits to ensure that funds are being used for the intended purposes.

Chair Lewis expressed understanding that data collection at the local levels can sometimes be difficult, but stated that the first data collection instrument was thorough and served as a good benchmark.

Chair Lewis introduced Mr. Mike Sciortino, Chair of the Standards Board, who stated that the Board recently elected and organized an executive board. The executive board met in Washington, DC with members of the Advisory Board and National Academy of Sciences to develop a framework for the proposed guidance on Statewide Voter Registration Database List. Commissioner Martinez thanked Chair Sciortino for his leadership and guidance. Commissioner Martinez also indicated that the Standard Board's meetings would be transcribed and open to the public. Mr. Wilkey requested that the Voting Standards Subcommittee convene briefly during the break.

Recess: The meeting was recessed until 10:45 AM.

Reconvene: When the meeting reconvened, Chair Lewis stated that those wishing to propose changes to the bylaws should discuss proposals at 1:15 p.m. at the back of the room towards the end of the working lunch. He also indicated to the Board changes to the Board contact roster should be submitted to Sheila Banks at EAC, who contact information is on the last page of the roster of the Board of Advisors. Chair Lewis then asked Mr. Wilkey, Chair of the Board's Standards Committee, to provide an update on voting systems standards.

Voting System Standards: Mr. Wilkey stated that he would be available to review the TGDC's proposed Voluntary Voting System Guidelines over the next few days. He encouraged Board Members not to be intimidated by the technical data and to ask for help in understanding the guidelines when necessary. He described the voting standards process as open and transparent and expressed amazement at its progress. Mr. Wilkey then stated that the 1990 standards took five years to develop and that there was a gap of time during which election officials determined what changes should be made to the standards.

Under HAVA, the TGDC and NIST had to produce its product in nine months and Mr. Wilkey stated that it was a monumental effort. Mr. Wilkey suggested that members of his committee, members of the board who were on the TGDC and a parallel group from the standards board convene for a day to get a briefing on the document. Mr. Wilkey asked Ms. Thompson if the contents of that meeting would be displayed on the website or otherwise be made available for the two groups. Mr. von Spakovsky asked when the latest version would be available and Mr. Wilkey responded that it would probably be available in the middle of June and that it

would be available on the website. Mr. Wilkey then encouraged everyone to read the overview enclosed in the booklets as a start.

Chair Lewis suggested that the Board of Advisors work like a legislative body and listen to recommendations its committees make to it. Commissioner Martinez informed Mr. von Spakovsky that the Commission intends to transmit the initial set of recommendation to Board of Advisors members when they receive them.

Chair Lewis asked Commissioner Martinez if there was sufficient time for Mr. Wilkey's committee and TGDC members to get together during the 90-day period. Commissioner Martinez stated that there would be ample time and that HAVA requires a minimum period of 90 days for review but as the Chair suggested, that period may extend longer than 90 days if necessary to ensure due diligence. Secretary Kiffmeyer suggested that the Board try to give guidance as early in the process as possible. Commissioner DeGregorio then suggested to Chair Lewis to request that Board members who worked with NIST on the standards in the past discuss their experiences.

EAC EAC Chair Hillman stated that the EAC has encouraged Board Members to review information as it became available and has sent letters in advance of the dates documents would be posted so that they could plan accordingly. Mr. von Spakovsky indicated concern over when Board Members would be getting a draft of voting standards for comments and EAC EAC Chair Hillman stated that the Commissioners would take his suggestion under advisement that the Board get a draft when the Commissioners receive their draft.

Chair Lewis requested that Ms. Purcell and Mr. Harding comment on their experiences as members of TGDC. Ms. Purcell stated that the TGDC broke into three subcommittees and met by conference call every week or every other week. In addition the TGDC had several plenary sessions and planned to issue the recommended VVSG to the Commissioners by May 9, 2005. Ms. Purcell stated that she was on the Security and Transparency Subcommittee and worked on Voter Verified Paper Audit Trail (VVPAT). Ms. Purcell also brought attention to the fact that what has been accomplished by TDGC to date is on the NIST website.

Mr. Harding stated that the reason the TGDC broke into committees is because it was the only way to manage the work since the document is so large. The TGDC also informed the NIST

officials of election officials' limitations and practical needs and resources. Mr. Harding suggested that a process be developed so that Board members can ask prompt questions to narrow the focus of comments.

Ms. Noren encouraged everyone on the Advisory Board to read the documents on NIST's website and to digest the technical standards as part of their legal obligation. She also stated that the Advisory Board has a huge duty to assure that standards are in place for the 2006 election.

Ms. Purcell commented that most election officials have been using the same equipment for decades and that the goal is long-term. She also stated that she was impressed with how fast the NIST was able to assimilate election information and how much time they devoted to learning about elections.

Secretary Carnahan asked if Version 1 would be finalized on May 9, 2005 and if Version 2 would be available by December 31, 2005. Ms. Purcell responded that they were aiming to finalize Version 2 in November. Secretary Carnahan then asked if vendors that would be able to meet the new guidelines as required by state law.

Chair Lewis stated that it was a false expectation to have the standards coincide with the availability of new equipment in compliance with standards.

Mr. Dickson asked if the final point of the document would be May 9, 2005, or after the comment period and Chair Lewis responded that it would be after the comment period and publishing in the Federal Register. Chair Lewis also indicated that there could be changes between the May 9, 2005, version and what goes into the Federal Register. Mr. Dickson finally asked what the thinking was in terms of a one-time purchase and the existence of evolving standards. Mr. Harding responded that election officials would need to purchase equipment as well as maintenance agreements with their sums.

Secretary Vigil-Giron stated that her state (NM) was moving toward uniformity of all systems and looks forward to the enactment of standards as a positive evolution.

Mr. Orr expressed confusion about the difference between the reality of purchasing compliant systems and the reality of the legal obligation to purchase compliant systems. Chair Lewis responded

that the first legal basis is that machines bought in compliance with the 2002 standards are still operable. However, the reality is that some political groups will expect the standards to be adopted immediately. Chair Lewis understands the frustration that follows from such expectations, but it is the reality.

Commissioner Martinez reiterated a point Ms. Noren made, that each state has to look at its own state law to determine which guidelines to follow and what equipment will be in compliance. The Commissioner also indicated that guidelines on VVPAT were intended to be the first of several different ways to achieve independent verification. Guidelines on others would be addressed in future iterations of VVSG.

Secretary Nelson asked what impact Version 1 will have on ITA certification and Commissioner Martinez responded that the Commission will consider whether grandfathering is appropriate in that regard. The TGDC has indicated to the Commissioners that any policy on grandfathering should be decided by the EAC and not decided by the TGDC.

Secretary Kiffmeyer expressed her concern that the Board considers public perception and she complimented the Board on their discussion.

Mr. Dickson asked if putting the expectation of updates into a contract with vendors would result in their taking advantage of that reliance. Ms. Noren stated that there may be a holdup problem, but that with guidance from NIST and EAC, vendors should be able to offer more accurate pricing.

Mr. Kliner and Commissioner Martinez discussed how grandfathering standards could affect legislatures' ability to plan for implementing new guidelines. Commissioner Martinez discussed the possibility of issuing guidelines with an implementation date far enough in the future to allow states to effectuate the changes. Ms. Paquette cautioned that Volume 2, which is available on NIST's website, may not accurately represent the balance in security systems that EAC wishes to achieve.

Recess and Reconvening: The meeting recessed for lunch at 12:13 PM and reconvened at 1:34 PM.

State Voter Registration Lists: Commissioner Martinez informed that under sections

311 and 312 of HAVA, EAC is obligated to issue guidance on the implementation of the administrative requirements in Title III. This includes Voting System Standards under Sections 301-303.

Commissioner Martinez indicated that EAC convened a working group to recommend draft guidelines on Statewide Voter Registration Lists. Among the members who participated were Secretary Nelson, Secretary Vigil-Giron, Ms. Sautermeister, Ms. Noren and Mr. von Spakovsky.

Commissioner Martinez noted that tab 7 in the Board's briefing book contains the draft guideline, which was published in the Federal Register on April 18, 2005.

EAC Chair Hillman stated that in conversations with Members of Congress, she has suggested that they reserve judgment about how and when HAVA dollars are spent until critical deadlines have been met by the States. Although states have an idea of the cost of replacing voting systems, many are finding that it will be much more expensive to develop, implement or update the voter registration. They may therefore have to amend their HAVA spending plans.

Secretary Kiffmeyer stated that it was not explicit in the language in the draft guidance that the state list be the official list. She also expressed concern about the definition of the word "expedited." Commissioner Martinez responded that the working group gave much attention to the language in Section 303(a)(1)(VI). As an example, Colorado elected to use a real-time transfer to comply with the expedited basis language in the statute. However, other states may interpret "expedited" differently. California currently plans that its statewide system will pull information from local databases, which will not happen instantaneously. The working group agreed that the term expedited should mean at least once every 24 hours.

Secretary Kiffmeyer stated that her question had more to do with the time between when a voter is issued a paper card and when it is entered into the system. Commissioner Martinez stated that once the information actually goes into the local official's database, the guidance recommends an upload every 24 hours. The 24-hour period does not start until the local official enters the information into the database.

Secretary Nelson stated that the working group recognized the problems election officials might have in getting many

registrations at once. He also thanked EAC and other members of the working group for a good and productive experience.

Mr. Dickson asked about obligations under Motor Voter and Commissioner Martinez indicated that the statute requires that there be coordination of the statewide voter registration list with "other agency databases." The statute also requires that there be regular coordination between the Statewide Voter Registration List and death records and felony status. Question 10 of the draft guidance deals with how the Statewide Voter Registration list should be coordinated with other registration databases, which includes agencies defined by NVRA. Commissioner Martinez indicated that there was a great deal of discussion in the working group about the obligations created under Motor Voter.

EAC Chair Hillman noted that EAC has fielded concern from various groups that certain social service agencies are not meeting their responsibilities under NVRA. In some cases, when the agencies are not meeting their obligations, election officials may not follow up with them.

Mr. Thomas stated that the data will show who is complying and who is not. He asserted that where less than 50 percent of a state's registrations come through motor vehicles, that state is probably not doing their job in those offices. Mr. Thomas noted that HAVA specifically does not use real-time language and although real-time may be a nice concept, he doesn't believe it's necessary. In his state of Michigan, they do an update every 24 hours. Mr. Thomas stated that the draft guidance do not sanction bottom-up systems that are not functional. He stated that functionality should include the NVRA purging processes.

Secretary Kiffmeyer stated that her state of Minnesota built a real-time system for \$5.3 million. She then asked Ms. Herrera how long it took to enter her state's 13,000 registrations. Ms. Herrera responded that it took about 3 weeks to enter all the registration forms because there were duplicates and other problems in verifying the entries.

Mr. Kliner was appreciative of the language in response to question 10 because the worry in Tennessee was that integration in real-time would increase the chance for a security breach. He indicated that he thought the 24 hour batch process would allay fears that local elections might have about computerized processes.

EAC Chair Hillman noted that this was the first time EAC put together a working group and the Commission was pleased that it went so well. Commissioner Martinez expressed his appreciation for the people who participated in the process and invited comments in the upcoming weeks.

Other Topics:

Chair Lewis asked if anyone had a subject matter they wished to discuss. Ms. Sautermeister emphasized the importance of the voter registration process, especially as it concerns states being able to share information. Chair Lewis stated that one of the long-term goals would be integration from state-to-state, but until the state databases are functional in that manner, it would be unlikely.

Ms. Purcell informed about changes being proposed by the state legislature to Arizona's voter laws. She noted one such measure that would require identification and disallow a person from receiving a ballot if they did not have identification.

Mr. Shortbull stated that South Dakota uses an affidavit system that he thinks works out well. He complimented Secretary of State Nelson on his efforts to work out glitches in the affidavit system. He expressed concerns that voter ID requirements could result in denial of civil rights. Commissioner Martinez stated that EAC is limited by NVRA and HAVA, but that Justice has enforcement authority under Title III of HAVA. HAVA does not preclude a state from imposing an ID requirement. HAVA also states in Section 303(b) that if someone is unable to vote because of a lack of ID, they should still be able to cast a provisional ballot.

Mr. Dickson stated that the Carter-Baker Commission is considering the issues of identification requirements and state interactive voter registration databases.

Chair Lewis stated that the Board would bypass a discussion of voter registration problems for another time and invited comments on the National Mail-In Registration Form.

Karen Lynn-Dyson introduced herself as the research manger for EAC. She advised the board about EAC's efforts to update the NVRA mail-in voter registration form. She also noted that EAC is considering the idea of a web-based form that would be able to be updated frequently. EAC will produce a Spanish version of the form and is looking at translating the form into six other languages. The final draft should be ready for public comment in July.

Chair Lewis asked if EAC has determined that a registration must have a driver's license number or other unique identifier in order to be a valid registration. Commissioner Martinez responded that EAC has not given an interpretation to that particular question. Mr. von Spakovsky of the Department of Justice stated that voter registration for Federal office cannot be accepted or processed by a state unless the application includes a driver's license or similar identification.

Mr. Wilkey pointed out the problem of the high number of citizens who cannot read or write. He recommended that EAC have the form reviewed by a literacy expert and commented on how some states use graphics to make the form easy to read and fill out.

Secretary Vigil-Giron pointed out that there are three provisions of the Voting Rights Act that are due to expire in 2007 that will affect minority voters. Thirty-six or 37 states were told that they had 5 percent language minority populations and had to include election materials in those languages.

Provisional Voting: Chairman Lewis stated that the next topic was provisional voting and that there may be additional time for other topics at the end. He asked for a starting point for the discussion.

Commissioner Martinez briefed the board on implementation of provisional voting. He noted the variance among states regarding when a provisional vote would be counted. He stated that 27 states in the country require that for a provisional vote to be counted, it had to have been cast in the voter's assigned precinct. Ohio is an example of one of those states.

Other states provide that if you vote in the correct county, but not the correct precinct, at least a partial ballot will count for Federal office. Georgia and New Mexico are examples of these states.

EAC will likely develop practices on implementing provisional voting. He noted that EAC held a public hearing on this issue in Columbus, Ohio and found that many states had not codified their provisional voting procedures. Florida is an example of one state that has codified its provisional voting procedures.

Commissioner Martinez further stated that EAC will undertake an effort to survey all states to determine how states are handling implementation of provisional voting.

EAC Vice Chair DeGregorio stated that the use of statewide databases throughout the country should help eliminate provisional voting for a lot of people. The overall goal is to have as few provisional ballots as possible. He also noted that EAC is collecting data on the numbers of provisional votes cast and counted in the 2004 election.

Several board members commented on various efforts being made by states and local jurisdictions to assure accurate voter lists and access to this information on Election Day by poll workers. Ms. Herrera asked why EAC hadn't come up with guidelines on how to count or process provisional ballots since provisional voting is a HAVA requirement. Commissioner Martinez responded that HAVA gives responsibility for methods of compliance and implementation to the states. EAC will issue guidance and best practices to inform jurisdictions but the states will have to promulgate their own procedures.

A general information discussion ensued about various procedures and rates of provisional votes cast and counted.

EAC Vice-Chair DeGregorio stated that preliminary statistics collected by EAC indicate that in states that had a statewide database in place for the 2004 election, about 6/10ths of one percent of registered voters used provisional ballots. In states that did not have a statewide database, the rate is about 1.4 percent, approximately double. However, there was no difference in ballots that were ultimately counted; 65 percent in states with a statewide voter registration system and 64.4 percent in states without a statewide voter registration system.

Chair Lewis stated that provisional voting was obviously a contentious issue because elected officials cannot agree on how to handle it. EAC Chair Hillman added that HAVA leaves it up to the states to define the jurisdiction and determine how and when a provisional ballot will be cast. Nonetheless, she encouraged the board to exercise its prerogative and provide advice and suggestions to EAC on how it should approach its various areas of responsibility.

Studies and Data Collection: Chair Lewis then introduced the next area of discussion, EAC studies and data collection.

EAC Chair Hillman pointed everyone to tab five of their binder, the Help America Vote Act tab. At the beginning of Section 241, it states that on a periodic basis, EAC shall conduct studies. Section

241 specifies 18 areas and a 19th on such other matters as EAC determines appropriate.

Sections 271 through 283 talk about grants for research on voting technology improvements and testing of equipment and technology, but those provisions are not funded by Congress, so EAC does not have money to provide grants for research on voting technology improvements or to do pilot program testing. EAC nonetheless is conscious of its role in certifying labs and will find money to do testing as appropriate.

Sections 302 through 305 address provisional voting, voting information, computerized statewide voter registration list requirements, minimum requirements and methods of implementation left to the discretion of the states. All of these sections govern the areas where EAC will issue guidance. EAC has put mechanisms in place to complete studies required by NVRA and overseas voting and EAC Chair Hillman anticipates that the data EAC collects in the 2006 election will guide the work it does afterwards.

EAC Chair Hillman noted that EAC has scoped out the basic framework for the 2006 research and study agenda. By the end of August 2005, EAC will have broadly identified its research agenda and study activities for 2007.

Commissioner Martinez stated that EAC is trying to use their appropriation for 2005 to focus on their obligations under the statute; development of voting system guidelines through NIST, the convening of statutory bodies, the development of guidance pursuant to Sections 311 and 312, and the mandated research. The only project that EAC is doing that is discretionary is the Election Day survey, which was sent to the states and was important for establishing a benchmark. Section 241 of HAVA has a laundry list of items that Congress has suggested and that EAC should research eventually. The question is whether there will be funds available to do some of the suggested research, and the Commissioners are interested in input from the Board on what areas of Section 241 EAC should explore.

Chair Lewis stated that during the break, he was approached by two officials, one state and one local, who requested that EAC invite comment from election officials before they release the Election Day survey to the public. Chair Lewis then asked if the Commissioners had determined what studies they planned to do in 2006 and 2007.

EAC Chair Hillman responded that EAC had not yet identified specific studies it would conduct but rather had established a broad framework that was included with its FY 2006 budget request.

Chair Lewis requested that members of the Board look at Section 241 and then facilitated a discussion that resulted in the board recommending prioritized areas of study under HAVA Section 241.

The top five areas recommended are:

- (8) Methods of recruiting, training and improving the performance of poll workers.
- (2) Ballot designs for elections for Federal office.
- (3) Methods of voter registration, maintaining secure and accurate lists of registered voters (including the establishment of a centralized, interactive, statewide voter registration list linked to relevant agencies and all polling sites) and ensuring that registered voters appear on the voter registration list at the appropriate polling site.
- (5) Methods of ensuring the accessibility of voting, registration, polling places and voting equipment to all voters, including individuals with disabilities (including the blind and visually impaired), Native American or Alaska Native citizens, and voters with limited proficiency in the English language.
- (4) Methods of conducting provisional voting.

Recess: The meeting recessed for the evening at 4:46 PM.

Reconvening: Chair Lewis reconvened the meeting at 8:30 a.m. on Thursday, April 28, 2005.

Updates and Reports: Chair Lewis outlined the agenda for the day's proceedings. The first session would be a Q and A session with EAC commissioners. After that would be a report of the Executive Director Search Committee, which would be conducted with the Board of Advisors members only. At the conclusion of the committee report, the meeting will be reopened to the public for adoption of bylaws and election of officers. After that, the board can vote on any issues.

Chair Lewis outlined the voting procedures to elect officers and answered questions accordingly.

Chair Lewis then invited the Board to pose questions to the Commissioners. Thereafter, the Commissioners would ask questions of the Board.

A number of issues were discussed during the Q and A session. Mr. Harding indicated that members of the Access Board were at EAC's disposal to assist in developing a VVSG that could be digested by the general public. The Commissioners answered various questions regarding anecdotal statements being made about the November 2004 election; possible means to increase voter turnout; VVPAT and possible alternatives; possible scenarios for jurisdictions not in compliance with HAVA come January 2006; access to EAC website; the voting systems certification and laboratory accreditation processes; the high rate of turnover amongst volunteers at groups that do voter registration training; and obstacles facing state and local election officials.

Executive Director Search Committee Report: The Board then met in Closed Session for 20-30 minutes to receive a report from its Executive Director Search Committee.

Adoption of Bylaws: Chair Lewis stated that the meeting was reopened to the public and that they would move on to the business section of the meeting. According to Robert's Rules, the group would read the bylaws and consider them as individual sections. After adoption of the bylaws and review of the proxies, there would be elections of officers. He then invited Ms. Kaufman, Chair of the Bylaws Committee, to go through the first reading of the bylaws.

Ms. Kaufman reported that the Bylaws Committee consisted of Beverly Kaufman, Chair, Wendy Noreen, Sue Sautermeister, Ernie Hawkins, and Doug Lewis. The first draft of recommended bylaws was distributed to the Board via e-mail prior to the meeting and copies were distributed on April 27. The Committee members in attendance had a mini-meeting on the 27th and were joined by other board members (Mr. von Spakovsky, Secretary Kiffmeyer, Nelson, and Mr. Crangle) who submitted recommendations for amendment. After the discussion, their suggestions were accepted and distributed to the board.

Mr. von Spakovsky moved to dismiss the reading because everyone in attendance had the bylaws in front of them and the friendly amendments had been accepted by the committee. He also moved to accept the bylaws. Secretary Vigil-Giron seconded the motion.

Secretary Kiffmeyer agreed with the dispensing of the reading, but had a question about a proposed amendment. Chair Lewis asked if Mr. von Spakovsky would amend his motion to dispense with the reading first and Mr. von Spakovsky agreed; Secretary Nelson seconded. Chair Lewis agreed that they would proceed without reading the bylaws and would proceed to the consideration.

As to Article 1, hearing no objections, Chair Lewis asked that all in favor of adopting Article 1 say, "aye." The Board voted to adopt Article 1.

Mr. Harding asked if Article 2 should cite the Federal Advisory Committee Act and Chair Lewis responded that he thought it was cited. Mr. Harding stated that the Article refers to the Act without a citation. Mr. Harding agreed with Chair Lewis that the Board could incorporate the citation by reference and attach them to future editions.

As to Article 2, hearing no objections, Chair Lewis asked that all in favor of adopting Article 2 say "aye." The Board voted to adopt Article 2.

Chair Lewis stated that Article 3 came straight from the law, but contained an incorrect item. Item I should read, "two members appointed by the International Association of Clerks, Recorders, Elections Officials, and Treasurers."

Mr. Hillman observed that he knew the language came from the law, but for the record, there is no such thing as the Office of Public Integrity in the Department of Justice. It is the Public Integrity Division of the Department of Justice. Chair Lewis asked that the correct information be sent to EAC.

As to Article 3, membership, hearing no objections, Chair Lewis asked that all in favor of adopting Article 3 say "aye". The Board voted to adopt Article 3.

As to Article 4, terms of service and filling of vacancies, Chair Lewis asked that all in favor of adopting Article 4 say "aye". The Board voted to adopt Article 4.

As to Article 5, officers, no one voiced an objection that the Board shall elect a Chair, Vice-Chair and Secretary; and the officers shall be elected by secret ballot, each position lasting for a period of one year, with no officer serving more than two consecutive terms in one office. Chair Lewis stated that he noticed while looking at the

bylaws that there was no indication of when elections or meetings would be held. Ms. Sautermeister explained that they only have to meet once a year and did not want to limit it to a certain meeting. Secretary Nelson suggested that it specify the required meeting as the first meeting each year. Mr. Thomas asked if the term of office would be affected with no meeting specified and Chair Lewis suggested that the term be one year or until the next election is held, to which Mr. Thomas agreed.

Secretary Vigil-Giron asked if the Parliamentarian is going to adopt rules of order or if the Board would adopt Robert's rules. Secretary Carnahan asked if the Committee suggested having party differences between the Chair and Vice Chair. Chair Lewis stated that he was hoping not to do that although he would consider it. There are some members of the group who cannot be identified with a particular political party and should not be ruled out because of that. Secretary Carnahan commented that EAC is separated by party and so are Secretaries of State. Chair Lewis indicated his understanding, but stated that some people in the group are not supposed to engage in partisan politics. Secretary Carnahan suggested that the Board categorize people as part of a party or independent or undeclared.

Ms. Kaufman stated that she agreed and that the Committee discussed the same issue but decided it would be better left to discussion. Mr. Dickson pointed out that the group had half an hour and asked that they deal with the issue expeditiously. Secretary Carnahan proposed an amendment to include a statement that the party filling a seat shall not fill the same seat two years in a row and that the Chair and Vice Chair should be from different parties. Chair Lewis suggested that one person being unaffiliated should not preclude their predecessor from also being unaffiliated. Secretary Vigil-Giron seconded. Chair Lewis asked if there was further discussion on the amendment that the Chair and Vice Chair be of different political parties. Mr. Hillman asked for guidance from the General Counsel and stated that he assumed that a Board of Advisors was an apolitical entity, so party identification might be unusual.

EAC Chair Hillman state that HAVA specifically says that appointment to the Board shall take into consideration party affiliation so there is a balance. Mr. von Spakovsky stated that in the year and a half that the Board has been operating, politics has not played a part in the Executive Committee and he did not wish to introduce politics now. There is a large mix of members on the Board, from all levels of government and Mr. von Spakovsky

stated that he does not want to know what political party each member affiliates with because it is unimportant to the Board's work.

Mr. Crangle stated that he thought most Americans look at party affiliation in terms of public image, and in that sense, it may be advisable to adopt the amendment. Mr. Hillman agreed with Mr. von Spakovsky about because he believes that identifying people with political parties suggests partisanship. Mr. Shortbull called the question and Chair Lewis asked for a vote on whether to adopt the procedure that the Chair and Vice Chair should be from different political parties. Nine were in favor and twelve were opposed, so the motion failed.

As to Article 5, added to the number 3 was "or until the next election." Added to number four was "for a specific office." And added as number 6 is "elections shall be held at the first meeting of each calendar year." Hearing no further comment, Chair Lewis asked that all in favor say "aye." The Board voted to adopt Article 5.

As to Article 6, duties of the officers, Chair Lewis asked all those in favor say "aye." The Board voted in favor of Article 6.

As to Article 7, meetings, Chair Lewis noted that the amendments notice went from 30 to 45 days and may be waived by a majority agreement of the members; meetings may be held by electronic means. EAC Chair Hillman asked that the number of meetings per calendar year be subject to the availability of funds. Hearing no further objections, Chair Lewis asked that all in favor say "aye." The Board voted to adopt Article 7.

EAC Chair Hillman asked about the waiver in Article 7. EAC is required to post a notice of all meetings in the Federal Register and wanted to be sure that they still provided for notice in the Federal Register. Ms. Noren suggested adding, "but not less than 14 days prior to" and Mr. von Spakovsky suggested to the extent permitted by law. It was his amendment and he intended that if there were an emergency, the group could waive the period. Chair Lewis agreed to change the language to "as permitted by law" and amended since it was already adopted.

As to Article 8, quorum and proxy voting, Chair Lewis suggested that proxies be given up to the day of the session. Mr. Crangle moved on the motion and Mr. Shortbull seconded. Thereafter, the Board voted to amend to subparagraph 2 of Article 8 to include the

words "up to the day of the meeting." The board voted to adopt Article 8.

As to Article 9, standing committees, Secretary Kiffmeyer suggested that E and F use parallel language since they require separate members from NASED and NASS. Secretary Vigil-Giron seconded the motion and Ms. Kaufman stated that she did not want to dilute the representation of IACREOT or NACRC as a result. Secretary Vigil-Giron stated that the goal was to represent different perspectives. Ms. Sautermeister asked if the motion only pertained to Voting Systems Standards Committee, to which Chair Lewis responded in the affirmative. He also noted that he would be objecting to it because it did not include a representative from the Elections Center. He suggested the addition of an H and an I and that the Election Center be represented. Secretary Kiffmeyer asked Chair Lewis if he was suggesting an amendment to the amendment proposed and he responded yes.

Mr. Nelson stated that his original intention in the language was to make sure that there was at least one person representing the state level organization, not to include someone from every organization. Ms. Herrera stated that it was important to separate Secretaries of State and State Election Directors since they certify and qualify machines. Chair Lewis suggested that they say one member from NACRC, IACREOT, the Election Center, NASS, and NASED be part of it, eliminating E through G, and the Committee would be 11 members instead of nine. The two added members would be the Election Center and dividing NASS and NASED.

Mr. Dickson asked if the Board was properly balancing interest groups in terms of groups that represent citizens and Chair Lewis responded that there would be five from the groups they just talked about and one from disabilities. Chair Lewis asked if they should add more groups from non-elections organizations. Mr. Kliner stated that if they expanded the groups, some of the people that would like to serve but are not affiliated could participate. Chair Lewis asked Secretary Nelson if it would be possible to say that the Chair can select members who are not part of the organizations and Secretary Nelson responded that he could have three at-large appointments from the board. Chair Lewis suggested that the Chair of the Board of Advisors select from people who are not already representative of the five organizations mentioned. Ms. Kaufman suggested restating the language to read each of the five organizations mentioned could have only one representative on the Committee.

Secretary Vigil-Giron asked if the group needed to correct the IACREOT name, and Chair Lewis pointed out that it did need to be corrected throughout. Mr. Dickson requested that the language be specific as to the pool from which the Chair could select members since he hoped the document would be around for many years.

The Board voted in favor of amending E to read, "One member, excluding the Chair, shall represent each of the following organizations."

Mr. Dickson moved to create subsection F, which would allow the Chair to select members who are not members specified in section E. Thereafter, the Board voted in favor of this amendment.

As to Article 9, hearing no objection, Chair Lewis asked that all in favor say "aye." The Board voted in favor of Article 9.

As to Article 10, amendments, Chair Lewis noted that the bylaws could be amended not less than 30 days prior to an annual meeting. Mr. Dickson asked if the bylaws can only be amended at something designated as an annual meeting. Secretary Kiffmeyer suggested not using the annual meeting language since they struck it in an earlier adoption. Chair Lewis suggested eliminating the word annual, which would include electronic meetings as well. Ms. Kaufman asked if they would still need a two-thirds vote to adopt bylaws and Secretary Nelson responded that two-thirds was correct.

As to Article 10, as amended, Chair Lewis asked that all in favor say "aye." The Board voted in favor of Article 10, as amended.

Proxy Voting:

EAC Chair Hillman expressed her hope that the availability of a proxy vote would not encourage people not to attend in person. Of the 37 members of the board eight are not very responsive and EAC is doing their best to work on them, but that does mean that 29 members are active and EAC Chair Hillman hopes to see a majority at every meeting.

Mr. Dickson suggested that the bylaws committee should decide on whether or not to limit the number of proxies. Chair Lewis stated that the issue would be assigned to the bylaws committee for recommendations at the next meeting. Secretary Kiffmeyer suggested that the bylaws reconcile the timing for getting proposing bylaw changes and getting information out to members

so that the Chair has a reasonable ability to get proposals and pass them on without it having to happen on the same day. Chair Lewis stated that ordinarily the proxies would be submitted to a Proxy committee to verify them as legitimate, but he suggested doing a quick adoption. There were proxies from David Orr, Wendy Noren, James Elekes, Ernie Hawkins, Jim Carnes, and Secretary Kiffmeyer. Chair Lewis responded to a question by indicating that the proxy would vote for those not present.

Mr. Crangle asked how people could vote by proxy before the adoption of the bylaws and Chair Lewis responded that he told everyone in advance that there would be proxies assuming the adoption of the bylaws. The Board voted to accept the proxies as submitted for this meeting.

Chair Lewis stated that Mr. Harding, Ms. Purcell, Ms. Kaufman, Director Brunelli, and the Chair would vote for themselves and their proxies. Chair Lewis counted 19 present and 6 proxies, with one non-voting member present. He got agreement that a majority would be 13 and passed around the ballots.

Election of Officers: Chair Lewis asked for nominations for Chair. Secretary Vigil-Giron nominated Mr. Crangle. Ms. Purcell nominated Ms. Kaufman. Each candidate made brief presentations about their interests in serving as Chair of the EAC Board of Advisors.

Votes were cast, Chair Lewis counted the votes and found that Ms. Kaufman received a majority of the votes with 18. Mr. Crangle moved to have the vote cast unanimously, Mr. Hillman seconded the motion and the Board voted in favor of the motion. Mr. Lewis congratulated Ms. Kaufman, who immediately assumed responsibilities as chair of the Board.

Chair Kaufman recognized Mr. Sirvello, who nominated Mr. von Spakovsky for the position of Vice-Chair. Secretary Vigil-Giron nominated Mr. Thomas. Mr. Shortbull stated that he was uneasy about having a member from the Department of Justice as an officer of Board.

The votes were cast and the ballots were counted with Mr. Thomas winning a majority with 14 votes.

Chair Kaufman asked for nominations for the office of Secretary. Mr. Shortbull nominated Secretary Vigil-Giron, who declined because of her duties as NASS President, but nominated Mr. Sirvello. Former Chair Lewis moved for nominations to cease,

which Ms. Herrera seconded. The Board voted in favor of the motion. Thereafter, The Board voted in favor of Mr. Sirvello as Secretary.

Items for Action:

Chair Kaufman thanked Mr. Lewis for his invaluable services as the Board's first chair. She stated that she has some huge shoes to fill and is grateful for the opportunity.

Mr. Dickson moved to have the Advisory Board urge EAC to engage experts to help with ballot design. The motion was seconded.

Mr. Harding asked what Mr. Dickson's intent was in suggesting the motion. Mr. Dickson stated that he wanted to get at the hard science of ballot design. Secretary Nelson asked if it was appropriate to direct the Commission to work with a particular organization. Chair Kaufman suggested that Mr. Dickson change the wording of his motion to soften the directive. Mr. Dickson agreed to insert "such as" so that other groups could be considered.

Chair Kaufman restated the motion moved that the Board urge EAC to engage experts to help with guidance on ballot design. Specifically, she moved that they reach out to those in low literacy, such as Democracy Design and simplified language. The Board voted in favor of the motion.

Ms. Purcell requested that suggestions on the VVSG from the Board members be e-mailed to Ms. Purcell or Mr. Harding.

Mr. Shortbull moved that the Executive Director report to be moved to EAC, which was seconded by Mr. Harding. The Board voted in favor of the motion.

Mr. Thomas moved to adjourn. The motion was seconded by Secretary Vigil-Giron.

Adjournment:

The meeting was adjourned at 12:41 P.M.

Eagleton/Mortiz Timeline

Date	Description
01/12/05	EAC staff draft proposes SOW for Provisional Voting
01/13/05	EAC staff presents draft proposed SOW for Provisional Voting to Commissioners
01/17/05	EAC staff drafts proposed SOW for Voter ID
01/18-02/14/05	EAC staff, in consultation with the Commissioners, draft proposed combined SOW for Provisional Voting and Voter ID
02/17/05	EAC staff meets with Commissioners and distributes SOW and outline of contracting process via email for Commissioner approval
03/02/05	EAC staff and Commissioners meet to discuss Provisional Voting and Voter ID Contract
03/23/05	EAC staff discuss Evaluation Criteria for the Provisional Voting and Voter ID RFP via email
03/30/05	EAC staff discuss Technical Evaluation Criteria for Provisional Voting and Voter ID Contract via email
05/24/05	EAC Commissioners Approve Contract Award to Eagleton
05/25/05	Eagleton notified of Contract Award
05/26/05	EAC Commissioner, EAC staff, and Eagleton meet at EAC office. Political balance of Peer Review Group amongst topics discussed. Commissioner DeGregorio subsequently suggests additional Peer Review Group participants
06/03/05	EAC staff notifies bidders via email that Eagleton has been awarded the Contract
06/06/05	Eagleton submits Revised Workplan extending deadlines to EAC staff via email
06/07-06/17/05	EAC staff and Eagleton conduct email discussion regarding Eagleton's plans to survey local election officials
06/09/05	EAC staff notifies Eagleton via email that 06/06 Workplan is not an acceptable deliverable
06/17/05	EAC staff receives Eagleton's revised workplan via email
06/20/05	EAC staff receives Eagleton's revised workplan via email
06/23-07/15/05	EAC staff and Eagleton discuss Peer Review Group via email
06/23/05	EAC staff emails Eagleton's proposed Peer Review Group to the Commissioners
06/27/05	EAC staff and Commissioners discuss the proposed Peer Review Group at briefing
07/06-07/07/05	Eagleton emails EAC staff information regarding Eagleton's local election official survey
07/08/05	Eagleton submits response to EAC staff's suggestion for additional Peer Review Group, including a list of proposed members
07/12/05	EAC Commissioners and staff hold teleconference with Eagleton

07/14/05	EAC staff and Eagleton discuss sample size and budget allocation for survey of local election officials via email
07/14/05	EAC staff receives Eagleton June 2005 Progress Report via email
07/15/05	EAC staff and Eagleton hold teleconference approving the composition of Eagleton's Peer Review Group
07/15/05	EAC staff emails Final Agenda for 07/28/05 hearing to Eagleton
07/15-07/26/05	EAC staff and Eagleton discuss details of 07/28 hearing via email
07/19-07/21/05	EAC staff and Eagleton hold email discussion regarding Eagleton's proposal for research regarding provisional ballot design. EAC staff declines Eagleton's proposal for adding ballot design to the project
07/19-08/08/05	Dates for meeting with EAC staff discussed with Eagleton via email
07/28/05	EAC Public hearing held at Cal/Tech in Pasadena. Eagleton briefs EAC Commissioners on progress of research
08/01/05	EAC staff and Eagleton discuss Peer Review Group via email
08/04/05	Vice-Chair DeGregorio provides EAC staff with a list of centrist/conservative groups via email in regards to Peer Review Group recruitment. EAC staff forwards list to Eagleton
08/08/05	Meeting with Eagleton on 09/06 at the EAC confirmed via email
08/09/05	Eagleton holds first teleconference with Peer Review Group regarding Provisional Voting Report
08/15/05	EAC staff receives July 2005 Progress Report from Eagleton via email
08/19-09/02/05	Commissioners, EAC staff, and Eagleton discuss potential members of Peer Review Group via email
09/01/05	Eagleton submits materials to EAC staff for 09/06 briefing via email
09/01-09/03/06	Eagleton emails answers to questions regarding the Provisional Voting Report analysis to EAC staff. Addititonal materials Fed Exed to EAC
09/05/05	EAC staff receives copy of Eagleton's PowerPoint presentation and alternatives document for 09/06 meeting via email
09/06/05	Commissioners and EAC staff hold briefing with Eagleton to review Provisional Voting Draft of Analysis and Alternatives Paper and discuss outline and direction of the Preliminary Guidance Document
09/14/05	Eagleton sends email to EAC staff requesting EAC Commissioner feedback on Alternative Next Steps
09/15/05	EAC staff receives Eagleton August 2005 Progress Report via email
09/21/06	Eagleton holds second teleconference with Peer Review Group
09/30/05	Teleconference with Eagleton, EAC staff, and Commissioner Martinez to discuss general direction and objective of research
09/30/05	EAC staff receives Provisional Voting Survey Report from Eagleton via email
10/17/05	EAC staff receives September 2005 Progress Report and Peer Review Group Summary Comments from Eagleton via email
11/14/05	EAC staff receives October 2005 Progress Report via email
11/14/05	EAC staff meets with Eagleton regarding execution of surveys
11/15-11/23/05	EAC staff and Eagleton discuss the status of the reports and the process for completion of reports via email

11/15/05	Eagleton requests No-Cost Extension and EAC staff initiates process via email
11/28/05	EAC staff receives Eagleton's Provisional Voting Report via email
11/29/05	EAC staff contacts Eagleton via email to request more detailed invoices for the new fiscal year
12/13/05	EAC staff receives Eagleton November 2005 Progress Report via email
01/17/06	EAC staff receives Eagleton December 2005 Progress Report via email
01/25/06	EAC staff approves Eagleton's no-cost extension request and notifies Eagleton via email
02/16/06	EAC staff receives Eagleton January 2006 Progress Report and inquires as to status of Voter ID Report via email
02/22/06	Eagleton holds teleconference with Peer Review Group regarding Voter ID Report
02/23/06	EAC staff discusses comments/edits to Eagleton via email
03/15/06	EAC staff inquires into ETA for Eagleton's Voter ID Report via email
03/15/06	EAC staff receives Eagleton Draft Voter ID Report via email
03/16/06	Eagleton Draft Voter ID Report distributed via email to Commissioners for comment
03/16/06	Eagleton emails Voter ID Report Appendix to EAC staff
03/16/06	EAC staff receives Eagleton February 2006 Progress Report via email
03/17/06	EAC staff emails Eagleton requesting explanation for using CPS rather than Election Day Survey data
03/21/06	Eagleton responds via email to EAC staff's inquiry into reasoning for use of CPS data rather than Election Day Survey
03/24/06	EAC staff informs Eagleton via email that it has requested Commissioner feedback regarding the Draft Voter ID Report by COB
03/28/06	EAC staff poses a number of questions via email regarding Eagleton's statistical manipulations, use of Census data, and statements made in Voter ID Report
03/28/06	EAC staff sends email request to Eagleton for confirmation that final payment invoice information is forthcoming
03/28/06	EAC staff participates in teleconference with Eagleton project staff, sharing general thoughts and posing questions about data and statements in Voter ID Report
03/31/06	EAC staff receives Eagleton's Draft Voter ID Report for 04/03 meeting via email
04/03/06	Commissioners Hillman and Davidson, EAC staff, and Eagleton meet in the morning to discuss Voter ID Report. Commissioners DeGregorio and Martinez, EAC staff, and Eagleton meet in the afternoon to discuss Voter ID Report
04/06/06	EAC staff sends email to Eagleton inquiring into next steps for the final Provisional Ballot and Voter ID Reports
04/13/06	EAC staff has teleconference with Eagleton regarding next steps for the final Provisional Ballot and Voter ID Reports. EAC staff requests that Eagleton convene a teleconference with Peer Review Group and EAC staff and/or Commissioners to discuss statistical analysis and Voter ID

	Report. EAC also reports that it will convene second Peer Review Group to seek further feedback. Eagleton also provides EAC staff with an extension timeline via email
04/14/06	EAC staff receives Eagleton's March 2006 Progress Report via email
04/19/06	EAC staff begins to process Eagleton's No-cost Extension request
04/21/06	Eagleton formally requests No-Cost Extension via email
04/25-04/27/06	EAC staff has email discussion with Eagleton regarding project timeline over next several weeks, including peer review, teleconference, and presentations at board meetings and public hearing
04/26/06	EAC staff approves Eagleton's No-Cost Extension Request and notifies Eagleton via email
04/27/06	EAC staff requests final draft of Provisional Ballot Report from Eagleton via email
04/28/06	EAC staff notifies Eagleton via email of Peer Review Group that the EAC has selected for Voter ID Report and sets 05/11 deadline for review and teleconference
05/01/06	EAC staff contacts Voter ID Peer Review Group via email regarding review and 05/11 teleconference
05/04/06	Eagleton distributes Revised Voter ID Analysis to EAC staff via email
05/05/06	EAC staff distributes Revised Voter ID Analysis to 2 nd Peer Review Group via email
05/08/06	EAC staff inquires via email as to the status of the final report on Provisional Voting from Eagleton
05/08/06	EAC staff receives Eagleton's Draft Voter ID Report via email
05/09/06	EAC staff receives Eagleton Draft Voter ID Report and Appendices and Distributes to Peer Review Group via email
05/09/06	EAC staff informs Eagleton via email that the Commissioners will review the final Provisional Voting and Voter ID Reports at their 05/16 and 05/18 meeting and that materials for distribution to the Board of Advisors and Standards Board must be ready by 05/18
05/09-05/17/06	EAC staff and Eagleton discuss details regarding presentations to the 05/23 and 05/24 Standards Board and Board of Advisors Meetings via email
05/11/06	Teleconference between EAC staff, Eagleton, members of the original Peer Review Group, and additional Peer Review Group members selected by the EAC regarding Voter ID Draft Report
05/12/06	EAC staff receives Eagleton's Draft of Provisional Voting Report for Review by the Standards Board and Board of Advisors via email
05/16/06	Commissioners and EAC staff hold briefing to discuss the presentation of Eagleton's Draft of Provisional Voting Report to the Standards Board and Board of Advisors. EAC staff emails feedback to Eagleton
05/17/06	EAC staff receives Eagleton's Draft of Voter ID Report and Appendices for Review by the Standards Board and Board of Advisors via email. EAC staff emails the information to the Commissioners
05/18/06	Commissioners and EAC staff hold briefing to discuss the presentation of Eagleton's Draft of Voter ID Report to the Standards Board and

	Board of Advisors. Commissioners elect to delay Eagleton's presentation of the Voter ID Report
05/18-22/06	EAC discusses details of Provisional Voting presentation with Eagleton via email
05/23/06	Eagleton presents Provisional Voting Report to EAC Standards Board
05/24/06	Eagleton presents Provisional Voting Report to EAC Board of Advisors
06/06/06	Eagleton sends letter to Commissioner DeGregorio regarding Provisional Voting and Voter ID Reports
06/08-06/26/06	EAC staff and Eagleton discuss conclusion of the Contract via email
06/05/06	EAC Executive Director sends letter to Eagleton regarding lack of clarity and ETA for final results of Voter ID study
06/29/06	Final Provisional Voting and Voter ID Draft Reports received by EAC staff from Eagleton via email. Attachments sent Fed Ex
06/30/06	EAC staff sends letter to Eagleton regarding remaining tasks to close out Contract
07/05/06	Telephone conversation between Eagleton and EAC staff regarding EAC's 06/30/06 letter regarding remaining tasks to close out Contract
07/06/06	Eagleton emails written summary of remaining tasks to close out Contract to EAC staff
07/19/06	Eagleton submits June 2006 Progress Report via email
07/20/06	Eagleton submits April 2006 and May 2006 Progress Reports via email
08/16/06	Eagleton submits final letter regarding Study Release to EAC staff via email and requests release of both Reports
08/24/06	Commissioners and EAC staff hold briefing regarding Eagleton Provisional Voting Draft Report and EAC Statement
08/24-09/06/06	EAC Commissioners and staff discuss Eagleton Provisional Voting Draft Report and EAC Statement to be released
08/28/06	EAC staff notified via email by Michael McDonald that Eagleton has released data from Provisional Voting and Voter ID Reports
08/31/06	EAC Executive Director notifies Eagleton that it is not authorized to release the Voter ID Draft Report as the Report has not been finalized and has not been officially released by the EAC.
09/15/06	EAC Commissioners and staff discuss release of information from the Voter ID Report to Hill staffers
09/28-09/29/06	After meeting with EAC staff, HR Communications edits Eagleton Provisional Voting Report for clarity and tone. HR Communications emails edits to EAC staff
10/02/06	EAC staff emails the professionally edited draft of Provisional Voting Report to Commissioners
10/03/06	EAC Commissioners and staff discuss the Provisional Voting Report at briefing
10/03/06	Eagleton contract closed and \$2,910.77 balance remaining deobligated
10/04/06	EAC staff and Eagleton review via email what information has been released regarding the Eagleton Reports
10/27/06	Eagleton writes to EAC Executive Director requesting an approximate

	date of release for the Voter ID Report
01/23/07	Federal Reporter Notice published regarding 02/28/07 Public Hearing
01/30-02/06/07	EAC staff discusses Eagleton Voter ID Draft Report and potential talking points for Voter ID segment of Public Hearing
02/06/07	Eagleton submits draft text of Presentation for 02/08 EAC Public Hearing to EAC staff via email
02/08/07	EAC holds Public Hearing where Eagleton provides Testimony and submits Voter ID Draft Report
03/06/07	Commissioners and EAC staff hold briefing regarding Eagleton Draft Voter ID Report and EAC Draft Statement
03/07/07	Commissioner Davidson appears before House Appropriations Subcommittee on Financial Services
03/06-03/20/07	EAC staff and Eagleton discuss edits to Voter ID Draft Report via email
03/21-03/29/07	EAC staff, and Eagleton discuss edits to Press Statement accompanying release of Eagleton Voter ID Draft Report
03/30/07	EAC releases Eagleton Voter ID Draft Report and Statement, Commissioner Rodriguez and Eagleton interviewed by NPR

GAVIN'S
COMMENTSEAC REPORT ON VOTING FRAUD AND VOTER INTIMIDATION STUDY

INTRODUCTION

Confidential

Voting fraud and intimidation are phrases familiar to many voting-aged Americans. However, they mean different things to different people. Voting fraud and intimidation are phrases used to refer to crimes, civil rights violations, and, at times, even the correct application of state or federal laws to the voting process. Past study of these topics has been as varied as its perceived meaning. In an effort to help understand the realities of voting fraud and voter intimidation in our elections, the U.S. Election Assistance Commission (EAC) has begun this, phase one, of a comprehensive study on election crimes. In this phase of its examination, EAC has developed a definition of election crimes and adopted ~~some~~ research methodology on how to assess the existence and enforcement of election crimes in this country. *working*

PURPOSE AND METHODOLOGY OF THE EAC STUDY

Section 241 of the Help America Vote Act of 2002 (HAVA) calls on the EAC to research and study various issues related to the administration of elections. During Fiscal Year 2006, EAC began projects to research several of the listed topics. These topics for research were chosen in consultation with the EAC's ~~Advisors~~ *Is Board and Board of* Advisors. Voting fraud and voter intimidation ~~were~~ *at the EAC as well as its* advisory boards felt were important to the administration of elections for federal office.

EAC began this study with the *Feinstein Stamp* common understanding of voting fraud and voter intimidation. This study was not a comprehensive study of these issues. This study was not a comprehensive review of existing research on voting fraud and voter intimidation, actions, laws, or prosecutions. To conduct that type of extensive research, a basic understanding had to first be established regarding what is commonly referred to as voting fraud and voter intimidation. Once that understanding was reached, a definition ^{was} had to be crafted to refine and in some cases limit the scope of what reasonably can be researched and studied as evidence of voting fraud and voter intimidation. That definition will serve as the basis for ~~recommending~~ ^a plan for a comprehensive study of the area. *why not*

To accomplish these tasks, EAC employed two consultants, ~~Job Serebrov and Tova Wang~~ ^{*along side*}, who worked with EAC staff and interns to conduct the research that forms the basis of this report. The consultants were chosen based upon their experience with the topic and to assure a bipartisan representation in this study. The consultants and EAC staff were charged to (1) research the current state of information on the topic of voting

under the supervision of

¹ Biographies for Job Serebrov and Tova Wang, the two consultants hired by EAC, are attached as Appendix "1".

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fraud and voter intimidation; (2) develop a uniform definition of voting fraud and voter intimidation; and (3) propose recommended strategies for researching this subject.

EAC ~~consultants~~ reviewed existing studies, articles, reports and case law on voting fraud and intimidation and conducted interviews with experts in the field. ~~EAC consultants and staff~~ then presented their initial findings to a working group that provided feedback. The working group participants were:

The Honorable Todd Rokita

Indiana Secretary of State
Member, EAC Standards Board and the
Executive Board of the Standards Board

Kathy Rogers

Georgia Director of Elections, Office of
the Secretary of State
Member, EAC Standards Board

J.R. Perez

Guadalupe County Elections
Administrator, Texas

Barbara Arnwine

Executive Director, Lawyers Committee
for Civil Rights under Law
Leader of Election Protection Coalition

Benjamin L. Ginsberg

Partner, Patton Boggs LLP
Counsel to national Republican
campaign committees and Republican
candidates

Robert Bauer

Chair of the Political Law Practice at the
law firm of Perkins Coie, District of
Columbia
National Counsel for Voter Protection,
Democratic National Committee

Mark (Thor) Hearne II

Partner-Member, Lathrop & Gage, St
Louis, Missouri
National Counsel to the American
Center for Voting Rights

Barry Weinberg

Former Deputy Chief and Acting Chief,
Voting Section, Civil Rights Division,
U.S. Department of Justice

Technical Advisor:

Craig Donsanto

Director, Election Crimes Branch, U.S.
Department of Justice

Throughout the process, EAC staff assisted the consultants by providing statutes and cases on this subject as well as supervision on the direction, scope and product of this research.

The consultants drafted a report for EAC that included their summaries of relevant cases, studies and reports on voting fraud and intimidation as well as summaries of the interviews that they conducted. The draft report also provided a definition of voting fraud and intimidation and made certain recommendations developed by the consultants or by the working group on how to pursue further study of this subject. This document was vetted and edited by EAC staff to produce this final report.

EXISTING INFORMATION ABOUT FRAUD AND INTIMIDATION

To begin our study of voting fraud and voter intimidation, EAC consultants reviewed the current body of information on voting fraud and intimidation. The information available about these issues comes largely from a very limited body of reports, articles, and books. There are volumes of case law and statutes in the various states that also impact our understanding of what actions or inactions are legally considered fraud or intimidation. Last, there is anecdotal information available through media reports and interviews with persons who have administered elections, prosecuted fraud, and studied these problems. All of these resources were used by EAC consultants to provide an introductory look at the available knowledge of voting fraud and voter intimidation.

Reports and Studies of Voting fraud and Intimidation

Over the years, there have been a number of studies conducted and reports published about voting fraud and voter intimidation. EAC reviewed many of these studies and reports to develop a base-line understanding of the information that is currently available about voting fraud and voter intimidation. EAC consultants reviewed the following articles, reports and books, summaries of which are available in Appendix “2”:

Articles and Reports

- People for the American Way and the NAACP, “The Long Shadow of Jim Crow,” December 6, 2004.
- Laughlin McDonald, “The New Poll Tax,” *The American Prospect* vol. 13 no. 23, December 30, 2002.
- Wisconsin Legislative Audit Bureau, “An Evaluation: Voter Registration Elections Board” Report 05-12, September, 2005.
- Milwaukee Police Department, Milwaukee County District Attorney’s Office, Federal Bureau of Investigation, United States Attorney’s Office “Preliminary Findings of Joint Task Force Investigating Possible Election Fraud,” May 10, 2005.
- National Commission on Federal Election Reform, “Building Confidence in U.S. Elections,” Center for Democracy and Election Management, American University, September 2005.
- The Brennan Center for Justice at NYU School of Law and Spencer Overton, Commissioner and Law Professor at George Washington University School of Law “Response to the Report of the 2005 Commission on Federal Election Reform,” September 19, 2005.

- Chandler Davidson, Tanya Dunlap, Gale Kenny, and Benjamin Wise, "Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression – or Both?" A Report to the Center for Voting Rights & Protection, September, 2004.
- Alec Ewald, "A Crazy Quilt of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law," The Sentencing Project, November 2005.
- American Center for Voting Rights "Vote Fraud, Intimidation and Suppression in the 2004 Presidential Election," August 2, 2005.
- The Advancement Project, "America's Modern Poll Tax: How Structural Disenfranchisement Erodes Democracy" November 7, 2001
- The Brennan Center and Professor Michael McDonald "Analysis of the September 15, 2005 Voting fraud Report Submitted to the New Jersey Attorney General," The Brennan Center for Justice at NYU School of Law, December 2005.
- Democratic National Committee, "Democracy at Risk: The November 2004 Election in Ohio," DNC Services Corporation, 2005
- Public Integrity Section, Criminal Division, United States Department of Justice, "Report to Congress on the Activities and Operations of the Public Integrity Section for 2002."
- Public Integrity Section, Criminal Division, United States Department of Justice, "Report to Congress on the Activities and Operations of the Public Integrity Section for 2003."
- Public Integrity Section, Criminal Division, United States Department of Justice, "Report to Congress on the Activities and Operations of the Public Integrity Section for 2004."
- Craig Donsanto, "The Federal Crime of Election Fraud," Public Integrity Section, Department of Justice, prepared for Democracy.Ru, n.d., at http://www.democracy.ru/english/library/international/eng_1999-11.html
- People for the American Way, Election Protection 2004, Election Protection Coalition, at <http://www.electionprotection2004.org/edaynews.htm>
- Craig Donsanto, "Prosecution of Electoral Fraud under United State Federal Law," *IFES Political Finance White Paper Series*, IFES, 2006.

- General Accounting Office, "Elections: Views of Selected Local Election Officials on Managing Voter Registration and Ensuring Eligible Citizens Can Vote," Report to Congressional Requesters, September 2005.
- Lori Minnite and David Callahan, "Securing the Vote: An Analysis of Election Fraud," Demos: A Network of Ideas and Action, 2003.
- People for the American Way, NAACP, Lawyers Committee for Civil Rights, "Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections," December 2004.

Books

- John Fund, *Stealing Elections: How Voting fraud Threatens Our Democracy*, Encounter Books, 2004.
- Andrew Gumbel, *Steal this Vote: Dirty Elections and the Rotten History of Democracy in American*, Nation Books, 2005.
- Tracy Campbell, *Deliver the Vote: A History of Election Fraud, An American Political Tradition – 1742-2004*, Carroll & Graf Publishers, 2005.
- David E. Johnson and Jonny R. Johnson, *A Funny Thing Happened on the Way to the White House: Foolhardiness, Folly, and Fraud in the Presidential Elections, from Andrew Jackson to George W. Bush*, Taylor Trade Publishing, 2004.
- Mark Crispin Miller, *Fooled Again*, Basic Books, 2005.

During our review of these documents, we learned a great deal about the type of research that has been conducted in the past concerning voting fraud and voter intimidation. None of the studies or reports was based on a comprehensive, nationwide study, survey or review of all allegations, prosecutions or convictions of state or federal crimes related to voting fraud or voter intimidation in the United States. Most reports focused on a limited number of case studies or instances of alleged voting fraud or intimidation. For example, "Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections," a report produced by the People for the American Way, focused exclusively on citizen reports of fraud or intimidation to the Election Protection program during the 2004 presidential election. Similarly, reports produced annually by the Department of Justice, Public Integrity Division, deal exclusively with crimes reported to and prosecuted by the United States Attorneys and/or the Department of Justice through the Public Integrity Section.

It is also apparent from a review of these articles and books that there is no consensus on the pervasiveness of voting fraud and voter intimidation. Some reports, such as

“Building Confidence in U.S. Elections,” suggest that there is little or no evidence of extensive fraud in U.S. elections or of multiple voting. This conflicts directly with other reports, such as the “Preliminary findings of Joint Task Force Investigating Possible Election Fraud,” produced by the Milwaukee Police Department, Milwaukee County District Attorney’s Office, FBI and U.S. Attorney’s Office. That report cited evidence of more than 100 individual instances of suspected double-voting, voting in the name of persons who likely did not vote, and/or voting using a name believed to be fake.

Voter intimidation is also a topic of some debate because there is little agreement on what constitutes actionable voter intimidation. Some studies and reports cover only intimidation that involves physical or financial threats, while others cover non-criminal intimidation, even legal practices, that allegedly cause vote suppression.

One point of agreement is that absentee voting and voter registration by nongovernmental groups create opportunities for fraud. A number of studies cited circumstances in which voter registration drives have falsified voter registration applications or have destroyed voter registration applications of persons affiliated with a certain political party. Others conclude that paying persons per voter registration application creates the opportunity and perhaps the incentive for fraud.

Interviews with Experts

In addition to reviewing prior studies and reports on voting fraud and intimidation, EAC consultants interviewed a number of persons regarding their experiences and research of voting fraud and voter intimidation. Persons interviewed included:

Wade Henderson
Executive Director,
Leadership Conference for Civil Rights

Wendy Weiser
Deputy Director,
Democracy Program, The Brennan
Center

William Groth
Attorney for the plaintiffs in the Indiana
voter identification litigation

Lori Minnite
Barnard College, Columbia University

Neil Bradley
ACLU Voting Rights Project

Pat Rogers
Attorney, New Mexico

Nina Perales
Counsel,
Mexican American Legal Defense and
Education Fund

Rebecca Vigil-Giron
Secretary of State, New Mexico

Sarah Ball Johnson
Executive Director,
State Board of Elections, Kentucky

Stephen Ansolobohere
Massachusetts Institute of Technology

Chandler Davidson
Rice University

Tracey Campbell

Author, *Deliver the Vote*

Douglas Webber

Assistant Attorney General, Indiana

Heather Dawn Thompson

Director of Government Relations,
National Congress of American Indians

Jason Torchinsky

Assistant General Counsel,
American Center for Voting Rights

Robin DeJarnette

Executive Director,
American Center for Voting Rights

Harry Van Sickle

Commissioner of Elections,
Pennsylvania

Tony Sirvello

Executive Director
International Association of Clerks,
Recorders, Election Officials and
Treasurers

Joseph Sandler

Counsel
Democratic National Committee

John Ravitz

Executive Director
New York City Board of Elections

Sharon Priest

Former Secretary of State, Arkansas

Kevin Kennedy

Executive Director
State Board of Elections, Wisconsin

Evelyn Stratton

Justice
Supreme Court of Ohio

Joseph Rich

Former Director
Voting Section, Civil Rights Division
U.S. Department of Justice

Craig Donsanto

Director, Public Integrity Section
U.S. Department of Justice

John Tanner

Director
Voting Section, Civil Rights Division
U.S. Department of Justice

These interviews in large part confirmed the conclusions that were gleaned from the articles, reports and books that were analyzed. For example, the interviewees largely agreed that absentee balloting is subject to the greatest proportion of fraudulent acts, followed by vote buying and voter registration fraud. They similarly pointed to voter registration drives by nongovernmental groups as a source of fraud, particularly when the workers are paid per registration. Many asserted that impersonation of voters is probably the least frequent type of fraud because it was the most likely type of fraud to be discovered, the stiff penalties associated with this type of fraud, and that it is an inefficient method of influencing an election.

Interviewees differed on what they believe constitutes actionable voter intimidation. Law enforcement and prosecutorial agencies tend to look to the criminal definitions of voter intimidation, which generally require some threat of physical or financial harm. On the other hand, voter rights advocates tended to point to activities such as challenger laws,

voter identification laws, polling place locations, and distribution of voting machines as activities that can constitute voter intimidation.

Those interviewed also expressed opinions on the enforcement of voting fraud and voter intimidation laws. States have varying authorities to enforce these laws. In some states, enforcement is left to the county or district attorney, and in others enforcement is managed by the state's attorney general. Regardless, voting fraud and voter intimidation are difficult to prove and require resources and time that many local law enforcement and prosecutorial agencies do not have. Federal law enforcement and prosecutorial agencies have more time and resources but have limited jurisdiction and can only prosecute election crimes perpetrated in elections with a federal candidate on the ballot or perpetrated by a public official under the color of law. Those interviewed differed on the effectiveness of the current system of enforcement. Some allege that prosecutions are not sufficiently aggressive. Others feel that the current laws are sufficient for prosecuting fraud and intimidation.

A summary of the each of the interviews conducted is attached as Appendix "3".

Case Law and Statutes

Consultants reviewed more than 40,000 cases that were identified using a series of search terms related to voting fraud and voter intimidation. The majority of these cases came from courts of appeal. This is not surprising, since most cases that are publicly reported come from courts of appeal. ~~Very few cases that are decided at the district court level are reported for public review.~~ *decisions*

Ask Job?
What is Steady votes?
Very few of the identified cases were applicable to this study. Of those that were applicable, no apparent thematic pattern emerged. However, it did seem that the greatest number of cases reported on fraud and intimidation have shifted from past patterns of stealing votes to present problems with voter registration, voter identification, the proper delivery and counting of absentee and overseas ballots, provisional voting, vote buying, and challenges to felon eligibility. *more detail*

A listing of the cases reviewed in this study is attached as Appendix "4".

Media Reports

EAC consultants reviewed thousands of media reports concerning a wide variety of potential voting fraud or voter intimidation, including:

- absentee ballot fraud,
- voter registration fraud,
- voter intimidation and suppression,
- deceased voters. *on newsherald?*
- multiple voting,
- felons voting, —

- non-citizens voting,
- vote buying,
- deceptive practices, and
- fraud by election officials.

While these reports showed that there were a large number of allegations of voting fraud and voter intimidation, they provided much less information as to whether the allegations were ever formalized as complaints to law enforcement, whether charges were filed, whether prosecutions ensued, and whether any convictions were made. The media reports were enlightening as to the pervasiveness of complaints of fraud and intimidation throughout the country, the correlation between fraud allegations and the perception that the state was a “battleground” or “swing” state, and the fact that there were reports of almost all types of voting fraud and voter intimidation. However, these reports do not provide much data for analysis as to the number of complaints, charges and prosecutions of voting fraud and intimidation throughout the country.

DEFINITION OF ELECTION CRIMES

From our study of available information on voting fraud and voter intimidation, we have learned that these terms mean many things to many different people. These terms are used casually to refer to anything from vote buying to refusing to register a voter to falsifying voter registration applications. ~~Upon further inspection, however,~~ ^{It is} apparent that there is no common understanding or agreement of what constitutes “voting fraud” and “voter intimidation.” Some think of voting fraud and voter intimidation only as criminal acts, while others include actions that may constitute civil wrongs, civil rights violations, and even legal and ~~appropriate~~ activities. ^{with assess} To arrive at a common definition and list of activities that can be studied, EAC assessed the appropriateness of the terminology that is currently in use and applied certain factors to limit the scope and reach of what can and will be studied by EAC ~~in the future.~~

New Terminology

The phrase “voting fraud” is really a misnomer for a concept that is much broader. “Fraud” is a concept that connotes an intentional act of deception, which may constitute either a criminal act or civil tort depending upon the willfulness of the act.

Fraud, n. 1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. • Fraud is usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime. ^{usage}

Black’s Law Dictionary, Eighth Edition, p. 685.

A “voter” is a person who is eligible to and engages in the act of voting. Black’s Law Dictionary, Eighth Edition, p. 1608. Using these terms to form a definition of “voting fraud,” it means fraudulent or deceptive acts committed by the voter or in which the voter is the victim. Thus, a voter who intentionally provides false information on a voter

registration application or intentionally impersonates another registered voter and attempts to vote for that person would be committing "voting fraud." Similarly, a person who knowingly provides false information to a voter about the location of the voter's polling place commits fraud on the voter.

if given it plan meaning,
The phrase "voting fraud" does not capture a myriad of other criminal acts that are related to elections which are not perpetrated by the voter and/or do not involve an act of deception. For example, "voting fraud" does not capture actions or willful inaction by candidates and election workers. When an election official willfully and knowingly refuses to register to vote a legally eligible person it is a crime. This is a crime that involves neither the voter nor an act of deception.

To further complicate matters, the phrases "voting fraud" and "voter intimidation" are used to refer to actions or inactions that are criminal as well as those that are potentially civil wrongs and even those that are legal. Obviously, criminal acts and civil wrongs are pursued in a very different manner. Criminal acts are prosecuted by the local, state or federal government. Generally, civil wrongs are prosecuted by the individual who believes that they were harmed. In some cases, when civil rights are involved, the Civil Rights Division of the Department of Justice may become involved.

decided to use election
The goal of this study was to develop a common definition of what is generically referred to as "voting fraud" and "voter intimidation" that would serve as the basis for a future, comprehensive study of the existence of these problems. In order to meet that goal, we recognize that the current terminology does not accurately represent the spectrum of activities that we desire to study. Furthermore, we recognize that the resources, both financial and human capital, needed to study allegations and prosecutions of criminal acts, suits involving civil torts, and allegations of potential voter suppression through the use of legal election processes are well beyond the resources available to EAC. As such, EAC has defined "election crimes," a phrase that captures all crimes related to the voter registration and voting processes.

The Definition of an Election Crime for Purposes of this Study

Election crimes are intentional acts or willful failures to act, prohibited by state or federal law, that are designed to cause ineligible persons to participate in the election process; eligible persons to be excluded from the election process; ineligible votes to be cast in an election; eligible votes not to be cast or counted; or other interference with or invalidation of election results. Election crimes generally fall into one of four categories: acts of deception, acts of coercion, acts of damage or destruction, and failures or refusals to act.

Election crimes can be committed by voters, candidates, election officials, or any other members of the public who desire to criminally impact the result of an election. However, crimes that are based upon intentional or willful failure to act assume that a duty to act exists. Election officials have affirmative duties to act with regard to elections. By and large, other groups and individuals do not have such duties.

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The victim of an election crime can be a voter, a group of voters, an election official, a candidate, or the public, in general. Election crimes can occur during any stage of the election process, including but not limited to qualification of candidates; voter registration; campaigning; voting system preparation and programming; voting (either early, absentee, or election day); vote tabulation; recounts; and recalls.

The following are examples of activities that may constitute election crimes. This list is not intended to be exhaustive, but is representative of what states and the federal government consider criminal activity related to elections.

Acts of Deception

- Knowingly causing to be mailed or distributed, or knowingly mailing or distributing, literature that includes false information about the voter's precinct or polling place, the date and time of the election or a candidate;
- Possessing an official ballot outside the voting location, unless the person is an election official or other person authorized by law or local ordinance to possess a ballot outside of the polling location;
- Making, or knowingly possessing, a counterfeit of an official election ballot;
- Signing a name other than his/her own to a petition proposing an initiative, referendum, recall, or nomination of a candidate for office;
- Knowingly signing more than once for the proposition, question, or candidate in one election;
- Signing a petition proposing an initiative or referendum when the signer is not a qualified voter.
- Voting or attempting to vote in the name of another person;
- Voting or attempting to vote more than once during the same election;
- Intentionally making a false affidavit, swearing falsely, or falsely affirming under an oath required by a statute regarding their voting status, including when registering to vote, requesting an absentee ballot or presenting to vote in person;
- Registering to vote without being entitled to register;
- Knowingly making a material false statement on an application for voter registration or re-registration; and
- Voting or attempting to vote in an election after being disqualified or when the person knows that he/she is not eligible to vote.

Acts of Coercion

- Using, threatening to use, or causing to be used force, coercion, violence, restraint, or inflicting, threatening to inflict, or causing to be inflicted damage harm, or loss, upon or against another person to induce or compel that person to vote or refrain from voting or to register or refrain from registering to vote;
- Knowingly paying, offering to pay, or causing to be paid money or other thing of value to a person to vote or refrain from voting for a candidate or for or against an election proposition or question;

- Knowingly soliciting or encouraging a person who is not qualified to vote in an election;
- Knowingly challenging a person's right to vote without probable cause or on fraudulent grounds, or engaging in mass, indiscriminate, and groundless challenging of voters solely for the purpose of preventing voter from voting or to delay the process of voting;
- As an employer, attempting by coercion, intimidation, threats to discharge or to lessen the remuneration of an employee, to influence his/her vote in any election, or who requires or demands an examination or inspection by himself/herself or another of an employee's ballot;
- Soliciting, accepting, or agreeing to accept money or other valuable thing in exchange for signing or refraining from signing a petition proposing an initiative;
- Inducing or attempting to induce an election official to fail in the official's duty by force, threat, intimidation, or offers of reward;
- Directly or through any other person advancing, paying, soliciting, or receiving or causing to be advanced, paid, solicited, or received, any money or other valuable consideration to or for the use of any person in order to induce a person not to become or to withdraw as a candidate for public office; and
- Soliciting, accepting, or agreeing to accept money or other thing of value in exchange for registering to vote.

Acts of Damage or Destruction

- Destroying completed voter registration applications;
- Removing or destroying any of the supplies or other conveniences placed in the voting booths or compartments;
- Removing, tearing down, or defacing election materials, instructions or ballots;
- Fraudulently altering or changing the vote of any elector, by which such elector is prevented from voting as the person intended;
- Knowingly removing, altering, defacing or covering any political sign of any candidate for public office for a prescribed period prior to and following the election;
- Intentionally changing, attempting to change, or causing to be changed an official election document including ballots, tallies, and returns; and
- Intentionally delaying, attempting to delay, or causing to be delayed the sending of certificate, register, ballots, or other materials whether original or duplicate, required to be sent by jurisdictional law.

Failure or Refusal to Act

- Intentionally failing to perform an election duty, or knowingly committing an unauthorized act with the intent to effect the election;
- Knowingly permitting, making, or attempting to make a false count of election returns;
- Intentionally concealing, withholding, or destroying election returns or attempts to do so;

- Marking a ballot by folding or physically altering the ballot so as to recognize the ballot at a later time;
- Attempting to learn or actually and unlawfully learning how a voter marked a ballot;
- Distributing or attempting to distribute election material knowing it to be fraudulent;
- Knowingly refusing to register a person who is entitled to register under the rules of that jurisdiction;
- Knowingly removing the eligibility status of a voter who is eligible to vote; and
- Knowingly refusing to allow an eligible voter to cast his/her ballot.

What is not an Election Crime for Purposes of this Study

There are some actions or inactions that may constitute crimes or civil wrongs that we do not include in our definition of "election crimes." All criminal or civil violations related to campaign finance contribution limitations, prohibitions, and reporting either at the state or federal level are not "election crimes" for purposes of this study and any future study conducted by EAC. Similarly, criminal acts that are unrelated to elections, voting, or voter registration are not "election crimes," even when those offenses occur in a polling place, voter registration office, or a candidate's office or appearance. For example, an assault or battery that results from a fight in a polling place or at a candidate's office is not an election crime. Similarly, violations of ethical provisions such as the Hatch Act are not "election crimes," and actions that do not rise to the level of criminal activity, such as a misdemeanor, relative felony or felony, are not "election crimes."

RECOMMENDATIONS ON HOW TO STUDY ELECTION CRIMES

As a part of its study, EAC sought recommendations on ways that EAC can research the existence of election crimes. EAC consultants, the working groups and some of the persons interviewed as a part of this study provided the following recommendations.

Recommendation 1: Conduct More Interviews

Future activity in this area should include conducting additional interviews. In particular, more election officials from all levels of government, parts of the country, and political parties should be interviewed. It would also be especially beneficial to talk to law enforcement officials, specifically federal District Election Officers ("DEOs") and local district attorneys, as well as civil and criminal defense attorneys.

Recommendation 2: Follow Up on Media Research

The media search conducted for this phase of the research was based on a list of search terms agreed upon by EAC consultants. Thousands of articles were reviewed and hundreds analyzed. Many of the articles contained allegations of fraud or intimidation. Similarly, some of the articles contained information about investigations into such

activities or even charges brought. Additional media research should be conducted to determine what, if any, resolutions or further activity there was in each case.

Recommendation 3: Follow Up on Allegations Found in Literature Review

Many of the allegations made in the reports and books that were analyzed and summarized by EAC consultants were not substantiated and were certainly limited by the date of publication of those pieces. Despite this, such reports and books are frequently cited by various interested parties as evidence of fraud or intimidation. Further research should include follow up on the allegations discovered in the literature review.

Recommendation 4: Review Complaints Filed With “MyVote1” Voter Hotline

During the 2004 election and the statewide elections of 2005, the University of Pennsylvania led a consortium of groups and researchers in conducting the MyVote1 Project. This project involved using a toll-free voter hotline that voters could call for poll locations, be transferred to a local hotline, or leave a recorded message with a complaint. In 2004, this resulted in more than 200,000 calls received and more than 56,000 recorded complaints.

Further research should be conducted using the MyVote1 data with the cooperation of the project leaders. While perhaps not a fully scientific survey given the self-selection of the callers, the information regarding 56,000 complaints may provide insight into the problems voters may have experienced, especially issues regarding intimidation or suppression.

Recommendation 5: Further Review of Complaints Filed With U.S. Department of Justice

According to a recent GAO report, the Voting Section of the Civil Rights Division of the Department of Justice has a variety of ways it tracks complaints of voter intimidation. Attempts should be made to obtain relevant data, including the telephone logs of complaints and information from the Interactive Case Management (ICM) system. Further research should also include a review and analysis of the DOJ/OPM observer and “monitor field reports” from Election Day.

Recommendation 6: Review Reports Filed By District Election Officers

Further research should include a review of the reports that must be filed by every District Election Officer to the Public Integrity Section of the Criminal Division of the Department of Justice. The DEOs play a central role in receiving reports of voting fraud and investigating and pursuing them. Their reports back to the Department would likely provide tremendous insight into what actually transpired during the last several elections. Where necessary, information could be redacted or made confidential.

Recommendation 7: Attend Ballot Access and Voting Integrity Symposium

Further activity in this area should include attending the next Ballot Access and Voting Integrity Symposium. At this conference, prosecutors serving as District Election Officers in the 94 U.S. Attorneys' Offices obtain annual training on fighting election fraud and voting rights abuses. These conferences are sponsored by the Voting Section of the Civil Rights Division and the Public Integrity Section of the Criminal Division, and feature presentations by Civil Rights officials and senior prosecutors from the Public Integrity Section and the U.S. Attorneys' Offices. By attending the symposium researchers could learn more about the following: how District Election Officers are trained; how information about previous election and voting issues is presented; and how the Voting Rights Act, the criminal laws governing election fraud and intimidation, the National Voter Registration Act, and the Help America Vote Act are described and explained to participants.

Recommendation 8: Conduct Statistical Research

EAC should measure voting fraud and intimidation using interviews, focus groups, and a survey and statistical analysis of the results of these efforts. The sample should be based on the following factors:

- Ten locations that are geographically and demographically diverse where there have been many reports of fraud and/or intimidation;
- Ten locations (geographically and demographically diverse) that have not had many reports of fraud and/or intimidation;

EAC should also conduct a survey of elections officials, district attorneys, and district election officers. The survey sample should be large in order to be able to get the necessary subsets, and it must include a random set of counties where there have and have not been a large number of allegations.

Recommendation 9: Explore Improvements to Federal Law

Future researchers should review federal law to explore ways to make it easier to impose either civil or criminal penalties for acts of intimidation that do not necessarily involve racial animus and/or a physical or economic threat.

Recommendation 10: Use Observers to Collect Data on Election Day

Use observers to collect data regarding fraud and intimidation at the polls on Election Day. There may be some limitations to the ability to conduct this type of research, including difficulty gaining access to polling places for the purposes of observation, and concerns regarding how the observers themselves may inadvertently or deliberately influence the occurrence of election crimes.

Recommendation 11: Study Absentee Ballot Fraud

Because absentee ballot fraud constitutes a large portion of election crimes, a stand-alone study of absentee ballot fraud should be conducted. Researchers should look at actual cases to see how absentee ballot fraud schemes are conducted in an effort to provide recommendations on more effective measures for preventing fraud when absentee ballots are used.

Recommendation 12: Use Risk Analysis Methodology to Study Fraud

Conduct an analysis of what types of fraud people are most likely to commit. Researchers will use that risk analysis to rank the types of fraud based on the “ease of commission” and the impact of the fraud.

Recommendation 13: Conduct Research Using Database Comparisons

Researchers should compare information on databases to determine whether the voter rolls contain deceased persons and felons. In addition, the voter rolls can then be compared with the list of persons who voted to determine whether a vote was recorded by someone who is deceased or if felons are noted as having voted.

Recommendation 14: Conduct a Study of Deceptive Practices

The working group discussed the increasing use of deceptive practices, such as flyers and phone calls with false and/or intimidating information, to suppress voter participation. A number of groups, such as the Department of Justice, the EAC, and organizations such as the Lawyers Committee for Civil Rights, keep phone logs regarding complaints of such practices. These logs should be reviewed and analyzed to see how and where such practices are being conducted and what can be done about them.

Recommendation 15: Study Use of HAVA Administrative Complaint Procedure as Vehicle for Measuring Fraud and Intimidation

EAC should study the extent to which states are utilizing the administrative complaint procedure mandated by HAVA. In addition, the EAC should study whether data collected through the administrative complaint procedure can be used as another source of information for measuring fraud and intimidation.

Recommendation 16: Examine the Use of Special Election Courts

Given that many state and local judges are elected, it may be worth exploring whether special election courts should be established to handle fraud and intimidation complaints before, during, and after Election Day. Pennsylvania employs such a system and could investigate how well that system is working.

Accepted Recommendations

There has never been a comprehensive, national study that gathered data regarding all claims, charges, and prosecutions of voting crimes. EAC feels that a comprehensive study is the most important research that it can offer the election community and the public. As such, EAC has adopted all or a part of six of the 16 recommendations made by EAC consultants and the working group.

While several of the other recommendations could be used to obtain more anecdotal information regarding election crimes, EAC believes that what is needed is a comprehensive survey and study of the information available from investigatory agencies, prosecutorial bodies and courts on the number and types of complaints, charges and prosecutions of election crimes. Additional media reviews, additional interviews and the use of observers to collect information from voters on Election Day will only serve to continue the use of anecdotal data to report on election crimes. Hard data on complaints, charges and prosecutions exists and we should gather and use that data, rather than rely on the perceptions of the media or the members of the public as to what might be fraud or intimidation.

Some of the recommendations are beyond the scope of the current study. While election courts may be a reasonable conclusion to reach after we determine the volume and type of election crimes being reported, charged or prosecuted, it is premature to embark on an analysis of that solution without more information. Last, some of the recommendations do not support a comprehensive study of election crimes. While a risk analysis might be appropriate in a smaller scale study, EAC desires to conduct a broader survey to avoid the existing problem of anecdotal and limited scope of information.

In order to further its goal of developing a comprehensive data set regarding election crimes and the laws and procedures used to identify and prosecute them, EAC intends to engage in the following research activities in studying the existence and enforcement of election crimes:

Survey Chief Election Officers Regarding Administrative Complaints

Likely sources of complaints concerning election crimes are the administrative complaint processes that states were required to establish to comply with Section 402 of HAVA. These complaint procedures were required to be in place prior to a state receiving any funds under HAVA. Citizens are permitted to file complaints alleging violations of HAVA Title III provisions under these procedures with the state's chief election official. Those complaints must be resolved within 60 days. The procedures also allow for alternative dispute resolution of claims. Some states have expanded this process to include complaints of other violations, such as election crimes.

In order to determine how many of these complaints allege the commission of election crimes, EAC will survey the states' chief election officers regarding complaints that have been filed, investigated, and resolved since January 1, 2004. EAC will use the definition

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of election crimes provided above in this report in its survey so that data regarding a uniform set of offenses will be collected.

Survey State Election Crime Investigation Units Regarding Complaints Filed and Referred

Several chief state election officials have developed investigation units focused on receiving, investigating, and referring complaints of election crimes. These units were established to bolster the abilities of state and local law enforcement to investigate allegations of election crimes. California, New York and Florida are just three examples of states that have these types of units.

EAC will use a survey instrument to gather information on the numbers and types of complaints that have been received by, investigated, and ultimately referred to local or state law enforcement by election crime investigation units since January 1, 2004. These data will help us understand the pervasiveness of perceived fraud, as well as the number of claims that state election officials felt were meritorious of being referred to local and state law enforcement or prosecutorial agencies for further action.

Survey Law Enforcement and Prosecutorial Agencies Regarding Complaints and Charge of Voting Crimes

While voters, candidates and citizens may call national hotlines or the news media to report allegations of election crimes, it is those complaints that are made to law enforcement that can be investigated and ultimately prosecuted. Thus, it is critical to the study of election crimes to obtain statistics regarding the number and types of complaints that are made to law enforcement, how many of those complaints result in the perpetrator being charged or indicted, and how many of those charges or indictments result in pleas or convictions.

Thus, EAC will survey law enforcement and prosecutorial agencies at the local, state and federal level to determine the number and types of complaints, charges or indictments, and pleas or convictions of election crimes since January 1, 2004. In addition, EAC will seek to obtain an understanding of why some complaints are not charged or indicted and why some charges or indictments are not prosecuted.

Analyze Survey Data in Light of State Laws and Procedures

Once a reliable data set concerning the existence and enforcement of election crimes is assembled, a real analysis of the effectiveness of fraud prevention measures can be conducted. For example, data can be analyzed to determine if criminal activities related to elections are isolated to certain areas or regions of the country. Data collected from the election official surveys can be compared to the data regarding complaints, charges and prosecutions gathered from the respective law enforcement and prosecutorial agencies in each jurisdiction. The effect and/or effectiveness of provisions such as voter identification laws and challenger provisions can be assessed based on hard data from

areas where these laws exist. Last, analyses such as the effectiveness of enforcement can be conducted in light of the resources available to the effort.

CONCLUSION

Election crimes are nothing new to our election process. The pervasiveness of these crimes and the fervor with which they have been enforced has created a great deal of debate among academics, election officials, and voters. Past studies of these issues have been limited in scope and some have been riddled with bias. These are issues that deserve comprehensive and nonpartisan review. EAC, through its clearinghouse role, will collect and analyze data on election crimes throughout the country. These data not only will tell us what types of election crimes are committed and where fraud exists, but also inform us of what factors impact the existence, prevention, and prosecution of election crimes.

*Mat's
comment*

EAC REPORT ON VOTER FRAUD AND VOTER INTIMIDATION STUDY

INTRODUCTION

Voter fraud and intimidation is a phrase familiar to many voting-aged Americans. However, it means different things to different people. Voter fraud and intimidation is a phrase used to refer to crimes, civil rights violations, and at times even the correct application of state or federal laws to the voting process. Past study of this topic has been as varied as its perceived meaning. In an effort to help understand the realities of voter fraud and voter intimidation in our elections, EAC has begun this, phase one, of a comprehensive study on election crimes. In this phase of its examination, EAC has developed a definition of election crimes and adopted some research methodology on how to assess the true existence and enforcement of election crimes in this country.

*IS IT A
PHRASE
OR
A SEPARATE
CONCEPT?*

PURPOSE AND METHODOLOGY OF THE EAC STUDY

Section 241 of the Help America Vote Act of 2002 (HAVA) calls on the U.S. Election Assistance Commission (EAC) to research and study various issues related to the administration of elections. During Fiscal Year 2006, EAC began projects to research several of the listed topics. These topics for research were chosen in consultation with the EAC Standards Board and Board of Advisors. Voter fraud and voter intimidation ~~was a topic~~ that EAC as well as its advisory boards felt were important to study to help improve the administration of elections for federal office.

EAC began this study with the intention of identifying a common understanding of voter fraud and intimidation and devising a plan for a comprehensive study of these issues. This study was not intended to be a comprehensive review of existing voter fraud and voter intimidation actions, laws, or prosecutions. That type of research is well beyond the basic understanding that had to be established regarding what is commonly referred to as voter fraud and voter intimidation. Once that understanding was reached, a definition had to be crafted to refine and in some cases limit the scope of what reasonably can be researched and studied as evidence of voter fraud and voter intimidation. That definition will serve as the basis for recommending a plan for a comprehensive study of the area.

*Good!
Clear
Statement*

To accomplish these tasks, EAC employed two consultants, who along with EAC staff and interns conducted the research that forms the basis of this report. Consultants were chosen based upon their experience with the topic. In addition, consultants were chosen to assure a bipartisan representation in this study. The consultants and EAC staff were charged (1) to research the current state of information on the topics of voter fraud and voter intimidation, (2) to develop a uniform definition of voter fraud and voter intimidation, and (3) to propose recommended strategies for researching this subject.

EAC consultants reviewed existing studies, articles, reports and case law on voter fraud and intimidation. In addition, EAC consultants conducted interviews with selected

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experts in the field. Last, EAC consultants and staff presented their study to a working group that provided feed back. The working group participants were:

The Honorable Todd Rokita

Indiana Secretary of State
Member, EAC Standards Board and the
Executive Board of the Standards Board

Kathy Rogers

Georgia Director of Elections, Office of
the Secretary of State
Member, EAC Standards Board

J.R. Perez

Guadalupe County Elections
Administrator, Texas

Barbara Arnwine

Executive Director, Lawyers Committee
for Civil Rights under Law
Leader of Election Protection Coalition

Benjamin L. Ginsberg

Partner, Patton Boggs LLP
Counsel to national Republican
campaign committees and Republican
candidates

Robert Bauer

Chair of the Political Law Practice at the
law firm of Perkins Coie, District of
Columbia
National Counsel for Voter Protection,
Democratic National Committee

Mark (Thor) Hearne II

Partner-Member, Lathrop & Gage, St
Louis, Missouri
National Counsel to the American
Center for Voting Rights

Barry Weinberg

Former Deputy Chief and Acting Chief,
Voting Section, Civil Rights Division,
U.S. Department of Justice

Technical Advisor:

Craig Donsanto

Director, Election Crimes Branch, U.S.
Department of Justice

Throughout the process, EAC staff assisted the consultants by providing statutes and cases on this subject as well as supervision on the direction, scope and product of this research.

The consultants drafted a report for EAC that included their summaries of existing laws, cases, studies and reports on voter fraud and intimidation as well as summaries of the interviews that they conducted. The draft report also provided a definition of voter fraud and intimidation and made certain recommendations developed by the consultants or by the working group on how to pursue further study of this subject. This document was vetted and edited to produce this final report.

EXISTING INFORMATION ABOUT FRAUD AND INTIMIDATION

To begin our study of voter fraud and voter intimidation, EAC consultants reviewed the current body of information on voter fraud and intimidation. What the world knows about these issues comes largely from a very limited body of reports, articles and books. There are volumes of case law and statutes in the various states that also impact our understanding of what actions or inactions are legally considered fraud or intimidation.

Last, there is anecdotal information available through media reports and interviews with persons who have administered elections, prosecuted fraud, and studied these problems. All of these resources were used by EAC consultants to provide an introductory look at the available knowledge of voter fraud and voter intimidation.

Reports and Studies of Voter Fraud and Intimidation

Over the years, there have been a number of studies conducted about the concepts of voter fraud and voter intimidation. EAC reviewed many of these studies and reports to develop a base-line understanding of the information that is currently available about voter fraud and voter intimidation. EAC consultants reviewed the following articles, reports and books, summaries of which are available in Appendix “_”:

Articles and Reports

- People for the American Way and the NAACP, “The Long Shadow of Jim Crow,” December 6, 2004.
- Laughlin McDonald, “The New Poll Tax,” *The American Prospect* vol. 13 no. 23, December 30, 2002.
- Wisconsin Legislative Audit Bureau, “An Evaluation: Voter Registration Elections Board” Report 05-12, September, 2005.
- Milwaukee Police Department, Milwaukee County District Attorney’s Office, Federal Bureau of Investigation, United States Attorney’s Office “Preliminary Findings of Joint Task Force Investigating Possible Election Fraud,” May 10, 2005.
- National Commission on Federal Election Reform, “Building Confidence in U.S. Elections,” Center for Democracy and Election Management, American University, September 2005.
- The Brennan Center for Justice at NYU School of Law and Spencer Overton, Commissioner and Law Professor at George Washington University School of Law “Response to the Report of the 2005 Commission on Federal Election Reform,” September 19, 2005.
- Chandler Davidson, Tanya Dunlap, Gale Kenny, and Benjamin Wise, “Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression – or Both?” A Report to the Center for Voting Rights & Protection, September, 2004.
- Alec Ewald, “A Crazy Quilt of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law,” The Sentencing Project, November 2005.

- American Center for Voting Rights “Vote Fraud, Intimidation and Suppression in the 2004 Presidential Election,” August 2, 2005.
- The Advancement Project, “America’s Modern Poll Tax: How Structural Disenfranchisement Erodes Democracy” November 7, 2001
- The Brennan Center and Professor Michael McDonald “Analysis of the September 15, 2005 Voter Fraud Report Submitted to the New Jersey Attorney General,” The Brennan Center for Justice at NYU School of Law, December 2005.
- Democratic National Committee, “Democracy at Risk: The November 2004 Election in Ohio,” DNC Services Corporation, 2005
- Public Integrity Section, Criminal Division, United States Department of Justice, "Report to Congress on the Activities and Operations of the Public Integrity Section for 2002."
- Public Integrity Section, Criminal Division, United States Department of Justice, "Report to Congress on the Activities and Operations of the Public Integrity Section for 2003."
- Public Integrity Section, Criminal Division, United States Department of Justice, "Report to Congress on the Activities and Operations of the Public Integrity Section for 2004."
- Craig Donsanto, "The Federal Crime of Election Fraud," Public Integrity Section, Department of Justice, prepared for Democracy.Ru, n.d., at http://www.democracy.ru/english/library/international/eng_1999-11.html
- People for the American Way, Election Protection 2004, Election Protection Coalition, at <http://www.electionprotection2004.org/edaynews.htm>
- Craig Donsanto, "Prosecution of Electoral Fraud under United State Federal Law," *IFES Political Finance White Paper Series*, IFES, 2006.
- General Accounting Office, "Elections: Views of Selected Local Election Officials on Managing Voter Registration and Ensuring Eligible Citizens Can Vote," Report to Congressional Requesters, September 2005.
- Lori Minnite and David Callahan, "Securing the Vote: An Analysis of Election Fraud," Demos: A Network of Ideas and Action, 2003.

- People for the American Way, NAACP, Lawyers Committee for Civil Rights, "Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections," December 2004.

Books

- John Fund, *Stealing Elections: How Voter Fraud Threatens Our Democracy*, Encounter Books, 2004.
- Andrew Gumbel, *Steal this Vote: Dirty Elections and the Rotten History of Democracy in American*, Nation Books, 2005.
- Tracy Campbell, *Deliver the Vote: A History of Election Fraud, An American Political Tradition – 1742-2004*, Carroll & Graf Publishers, 2005.
- David E. Johnson and Jonny R. Johnson, *A Funny Thing Happened on the Way to the White House: Foolhardiness, Folly, and Fraud in the Presidential Elections, from Andrew Jackson to George W. Bush*, Taylor Trade Publishing, 2004.
- Mark Crispin Miller, *Fooled Again*, Basic Books, 2005.

During our review of these documents, we learned a great deal about the type of research that has been conducted in the past concerning voter fraud and voter intimidation. None of the studies or reports was based on a comprehensive study, survey or review of all allegations, prosecutions or convictions of state or federal crimes related to voter fraud or voter intimidation. Most reports focused on a limited number of case studies or instances of alleged voter fraud or intimidation. For example, "Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections," a report produced by the People for the American Way, focused exclusively on citizen reports of fraud or intimidation to the Election Protection program during the 2004 presidential election. Similarly, reports produced annually by the Department of Justice, Public Integrity Division, deal exclusively with crimes reported to and prosecuted by the United States Attorneys and/or the Department of Justice through the Public Integrity Section. JW LOWE: NS SENT 1/2/05

It is also apparent from a review of these articles and books that there is no consensus on the pervasiveness of voter fraud and voter intimidation. Some reports, such as "Building Confidence in U.S. Elections," suggest that there is little or no evidence of extensive fraud in U.S. elections or of multiple voting. This conflicts directly with other reports, such as the "Preliminary findings of Joint Task Force Investigating Possible Election Fraud," produced by the Milwaukee Police Department, Milwaukee County District Attorney's Office, FBI and U.S. Attorney's Office. That report cited evidence of more than 100 individual instances of suspected double-voting, voting in the name of persons who likely did not vote, and/or voting using a name believed to be fake.

Voter intimidation is also a topic of some debate. Generally speaking there is little agreement on what constitutes actionable voter intimidation. Some studies and reports cover only intimidation that involves physical or financial threats, while others cover non-criminal intimidation even legal practices that they allege suppress the vote.

One point of agreement is that absentee voting and voter registration by third-party groups create opportunities for fraud. A number of studies cited circumstances in which voter registration drives have falsified voter registration applications or have destroyed voter registration applications of voters of a certain party. Others conclude that paying persons per voter registration application creates the opportunity and perhaps the incentive for fraud.

Interviews with Experts

In addition to reviewing prior studies and reports on voter fraud and intimidation, EAC consultants interviewed a number of persons regarding their experiences and research of voter fraud and voter intimidation. Persons interviewed included

Wade Henderson
Executive Director,
Leadership Conference for Civil Rights

Wendy Weiser
Deputy Director,
Democracy Program, The Brennan
Center

William Groth
Attorney for the plaintiffs in the Indiana
voter identification litigation

Lori Minnite
Barnard College, Columbia University

Neil Bradley
ACLU Voting Rights Project

Nina Perales
Counsel,
Mexican American Legal Defense and
Education Fund

Pat Rogers
Attorney, New Mexico

Rebecca Vigil-Giron
Secretary of State, New Mexico

Sarah Ball Johnson
Executive Director,
State Board of Elections, Kentucky

Stephen Ansolobehere
Massachusetts Institute of Technology

Chandler Davidson
Rice University

Tracey Campbell
Author, *Deliver the Vote*

Douglas Webber
Assistant Attorney General, Indiana

Heather Dawn Thompson
Director of Government Relations,
National Congress of American Indians

Jason Torchinsky
Assistant General Counsel,
American Center for Voting Rights

Robin DeJarnette
Executive Director,
American Center for Voting Rights

Harry Van Sickle
Commissioner of Elections,
Pennsylvania

Joseph Sandler
Counsel
Democratic National Committee

John Ravitz
Executive Director
New York City Board of Elections

Sharon Priest
Former Secretary of State, Arkansas

Kevin Kennedy
Executive Director
State Board of Elections, Wisconsin

Evelyn Stratton
Justice
Supreme Court of Ohio

Tony Sirvello
Executive Director
International Association of Clerks,
Recorders, Election Officials and
Treasurers

Joseph Rich
Former Director
Voting Section, Civil Rights Division
U.S. Department of Justice

Craig Donsanto
Director, Public Integrity Section
U.S. Department of Justice

John Tanner
Director
Voting Section, Civil Rights Division
U.S. Department of Justice

These interviews in large part confirmed the conclusions that were gleaned from the articles, reports and books that were analyzed. For example, the interviewees largely agreed that absentee balloting is subject to the greatest proportion of fraudulent acts, followed by vote buying and voter registration fraud. They similarly pointed to voter registration drives by third-party groups as a source of fraud, particularly when the workers are paid per registration. Many asserted that impersonation of voters is probably the least frequent type of fraud, citing as reasons that it was the most likely type of fraud to be discovered and that there are stiff penalties associated with this type of fraud.

Interviewees differed on what they believe constitutes actionable voter intimidation. Law enforcement and prosecutorial agencies tend to look to the criminal definitions of voter intimidation which generally require some threat of physical or financial harm. On the other hand, voter rights advocates tended to point to activities such as challenger laws, voter identification laws, the location of polling places, and distribution of voting machines as activities that can constitute voter intimidation.

Those interviewed also expressed opinions on the enforcement of voter fraud and voter intimidation laws. States have varying authorities to enforce these laws. In some states, enforcement is left to the county or district attorney, and in others enforcement is managed by the state's attorney general. Regardless, voter fraud and voter intimidation are difficult to prove and require resources and time that local law enforcement and prosecutorial agencies do not have. Federal law enforcement and prosecutorial agencies

have more time and resources but have limited jurisdiction. They can only prosecute crimes related to elections involving federal candidates. Those interviewed differed on the effectiveness of the current system of enforcement, including those that allege that prosecutions are not sufficiently aggressive and those that feel that the current laws are sufficient for prosecuting fraud and intimidation.

A summary of the each of the interviews conducted is attached as Appendix “___”.

Case Law and Statutes

Consultants reviewed over 40,000 cases that were identified using a series of search terms related to voter fraud and voter intimidation. The majority of these cases came from ~~appeal courts~~ ^{COURTS OF APPEAL}. This is not a surprising situation, since most cases that are publicly reported come from courts of appeal. Very few cases that are decided at the district court level are reported for public review.

Very few of the identified cases were applicable to this study. Of those that were applicable, no apparent thematic pattern emerged. However, it did seem that the greatest number of cases reported on fraud and intimidation have shifted from past patterns of stealing votes to present problems with voter registration, voter identification, the proper delivery and counting of absentee and overseas ballots, provisional voting, vote buying and challenges to felon eligibility.

A listing of the cases reviewed in this study is attached as Appendix “___”.

Media Reports

EAC consultants reviewed thousands of media reports concerning a wide variety of potential voter fraud or voter intimidation, including:

- absentee ballot fraud,
- voter registration fraud,
- voter intimidation and suppression,
- deceased voters,
- multiple voting,
- felons voting,
- non-citizens voting,
- vote buying,
- deceptive practices, and
- fraud by election officials.

While these reports showed that there were a large number of allegations of voter fraud and voter intimidation, they provided much less information as to whether the allegations were ever formalized as complaints to law enforcement, whether charges were filed, whether prosecutions ensued, and whether any convictions were made. The media reports were enlightening as to the pervasiveness of complaints of fraud and intimidation

throughout the country, the correlation between fraud allegations and the perception that the state was a “battleground” or “swing” state, and the fact that there were reports of almost all types of voter fraud and voter intimidation. However, these reports do not provide much data for analysis as to the number of complaints, charge and prosecutions of voter fraud and intimidation throughout the country.

DEFINITION OF ELECTION CRIMES

From our study of available information on voter fraud and voter intimidation, we have learned that these terms mean many things to many different people. These terms are used casually to refer to anything from vote buying to refusing to register a voter to falsifying voter registration applications. Upon further inspection, however, it is apparent that there is no common understanding of what is and what is not “voter fraud” and “voter intimidation.” Some think of voter fraud and voter intimidation only as criminal acts, while others include actions that may constitute civil wrongs, civil rights violations, and even legal and appropriate activities. In order to come up with a common definition and list of activities that can be studied, EAC assessed the appropriateness of the terminology that is currently in use and applied certain factors to limit the scope and reach of what can and will be studied by EAC in the future.

New Terminology

The phrase “voter fraud” is really a misnomer for a concept that is much broader. “Fraud” is a concept that connotes an intentional act of deception, which may constitute either a criminal act or civil tort depending upon the willfulness of the act.

Fraud, n. 1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. • Fraud is usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime.

Black’s Law Dictionary, Eighth Edition, p. 685.

A “voter” is a person who is eligible to and engages in the act of voting. Black’s Law Dictionary, Eighth Edition, p. 1608. Using these terms to form a definition of “voter fraud,” it means fraudulent or deceptive acts committed by the voter or in which the voter is the victim. Thus, a voter who intentionally provides false information on a voter registration application or intentionally impersonates another registered voter and attempts to vote for that person would be committing “voter fraud.” Similarly, a person who knowingly provides false information to a voter about the location of the voter’s polling place commits fraud on the voter.

The phrase “voter fraud” does not capture a myriad of other criminal acts that are related to elections which are not perpetrated by the voter and/or do not involve an act of deception. For example, “voter fraud” does not capture actions or willful inaction by candidates and election workers. When an election official willfully and knowingly

refuses to register to vote an otherwise legally eligible person it is a crime. This is a crime that involves neither the voter nor an act of deception.

→ DOESN'T IT INVOLVE A VOTER?

To further complicate matters, the phrases “voter fraud” and “voter intimidation” are used to refer to actions or inactions that are criminal as well as those that are potentially civil wrongs and even those that are legal. Obviously, criminal acts and civil wrongs are pursued in a very different manner. Criminal acts are prosecuted by the local, state or federal government. Generally, civil wrongs are prosecuted by the individual who believes that they were harmed. In some cases, when civil rights are involved, the civil division of the Department of Justice may become involved.

The goal of this study was to develop a common definition of what is generically referred to as “voter fraud” and “voter intimidation” that would serve as the basis of a future, comprehensive study of the existence of these problems. In order to meet that goal, we recognize that the current terminology does not accurately represent the spectrum of activities that we desire to study. Furthermore, we recognize that the resources, both financial and human capital, needed to study allegations and prosecutions of criminal acts, suits involving civil torts, and allegations of potential voter suppression through the use legal election processes are well beyond the resources available to EAC. As such, EAC has defined “election crimes,” a phrase that captures all crimes related to the voter registration and voting processes.

What is an Election Crime for Purposes of this Study

Election crimes are intentional acts or willful failures to act, prohibited by state or federal law, that are designed to cause ineligible persons to participate in the election process, eligible persons to be excluded from the election process, ineligible votes to be cast in an election, eligible votes not to be cast or counted, or other interference with or invalidation of election results. Election crimes generally fall into one of four categories: acts of deception, acts of coercion, acts of damage or destruction, and failures or refusals to act.

Generally speaking, election crimes can be committed by voters, candidates, election officials, or any other members of the public that desire to criminally impact the result of an election. However, crimes that are based upon knowing or willful failure to act assume that a duty to act exists. Election officials have affirmative duties to act with regard to elections. By and large, other groups and individuals do not have such duties.

The victim of an election crime can be a voter, a group of voters, or the public, in general. Election crimes can occur during any stage of the election process, including but not limited to qualification of candidates; voter registration; campaigning; voting system preparation and programming; voting either early, absentee, or election day; vote tabulation; recounts; and recalls.

The following are examples of activities that may constitute election crimes. This list is not intended to be exhaustive, but is representative of what states and the federal government consider criminal activity related to elections.

Acts of Deception

- Knowingly causing to be mailed or distributed, or knowingly mailing or distributing, literature that includes false information about the voter's precinct or polling place, regarding the date and time of the election or regarding a candidate;
- Possessing an official ballot outside the voting location, unless the person is an election official or other person authorized by law or local ordinance possess a ballot outside of the polling location;
- Making, or knowingly possessing, a counterfeit of an official election ballot;
- Signing a name other than his/her own to a petition proposing an initiative, referendum, recall, or nomination of a candidate for office;
- Knowingly signing more than once for the proposition, question, or candidate at one election;
- Signing a petition proposing an initiative or referendum when the signer is not a qualified voter.
- Voting or attempting to vote in the name of another person;
- Voting or attempting to vote more than once at the same election;
- Intentionally making a false affidavit, swearing falsely, or falsely affirming under an oath required by a statute regarding their voting status, including when registering to vote, requesting an absentee ballot or presenting to vote in person;
- Registering to vote without being entitled to register;
- Knowingly making a material false statement on an application for voter registration or re-registration; and
- Voting or attempting to vote in an election after being disqualified or when the person knows that he/she is not eligible to vote.

Acts of Coercion

- Using, threatening to use, or causing to be used force, coercion, violence, restraint, or inflicting, threatening to inflict, or causing to be inflicted damage harm, or loss, upon or against another person to induce or compel that person to vote or refrain from voting or to register or refrain from registering to vote;
- Knowingly paying, offering to pay, or causing to be paid money or other valuable thing to a person to vote or refrain from voting for a candidate or for or against an election proposition or question;
- Knowingly soliciting or encouraging a person who is not qualified to vote in an election;
- Knowingly challenging a person's right to vote without probable cause or on fraudulent grounds, or engaging in mass, indiscriminate, and groundless challenging of voters solely for the purpose of preventing voter from voting or delay the process of voting;
- As an employer, attempting by coercion, intimidation, threats to discharge or to lessen the remuneration of an employee, to influence his vote in any election, or who requires or demands an examination or inspection by himself or another of an employee's ballot;

- Soliciting, accepting, or agreeing to accept money or other valuable thing in exchange for signing or refraining from signing a petition proposing an initiative;
- Inducing or attempting to induce an election official to fail in the official's duty by force, threat, intimidation, or offers of reward;
- Directly or through any other person advancing, paying, soliciting, or receiving or causing to be advanced, paid, solicited, or received, any money or other valuable consideration to or for the use of any person in order to induce a person not to become or to withdraw as a candidate for public office; and
- Soliciting, accepting, or agreeing to accept money or other valuable thing in exchange for registering to vote.

Acts of Damage or Destruction

- Removing or destroying any of the supplies or other conveniences placed in the voting booths or compartments for the purpose of enabling the voter to vote his or her ballot;
- Removing, tearing down, or defacing election materials, instructions or ballots;
- Fraudulently altering or changing the vote of any elector, by which such elector is prevented from voting as he intended;
- Knowingly removing, altering, defacing or covering any political sign of any candidate for public office for a prescribed period prior to and following the election;
- Intentionally changing, attempting to change, or causing to be changed an official election document including ballots, tallies, and returns; and
- Intentionally delaying, attempting to delay, or causing to be delayed the sending of certificate, register, ballots, or other materials whether original or duplicate, required to be sent by jurisdictional law.

Failure or Refusal to Act

- Intentionally failing to perform an election duty, or knowingly committing an unauthorized act with the intent to effect the election;
- Knowingly permitting, making, or attempting to make a false count of election returns;
- Intentionally concealing, withholding, or destroying election returns or attempts to do so;
- Marking a ballot by folding or physically altering the ballot so as to recognize the ballot at a later time;
- Attempting to learn or actually and unlawfully learning how a voter marked a ballot;
- Distributing or attempting to distribute election material knowing it to be fraudulent;
- Knowingly refusing to register a person who is entitled to register under the rules of that jurisdiction; and
- Knowingly refusing to allow an eligible voter to cast his/her ballot.

What is not an Election Crime for Purposes of this Study

There are some actions or inactions that may constitute crimes or civil wrongs that we do not include in our definition of “election crimes.” All crimes or civil violations related to campaign finance reporting either at the state or federal level are not “election crimes” for purposes of this study and any future study conducted by EAC. Similarly, criminal acts that are unrelated to elections, voting, or voter registration are not “election crimes,” even when those offenses occur in a polling place, voter registration office, or a candidate’s office or appearance. For example, an assault or battery that results from a fight in a polling place or at a candidate’s office is not an election crime. Similarly, violations of ethical provisions such as the Hatch Act are not “election crimes.” Last, actions that do not rise to the level of criminal activity, that is a misdemeanor, relative felony or felony, are not “election crimes.”

RECOMMENDATIONS ON HOW TO STUDY ELECTION CRIMES

As a part of its study, EAC sought recommendations on ways that EAC can study the existence of election crimes. EAC consultants ~~developed recommendations~~. In addition, the working group, and some of the persons interviewed as a part of this study provided recommendations.

Recommendation 1: Conduct More Interviews

Future activity in this area should include conducting additional interviews. In particular, more election officials from all levels of government, parts of the country, and parties should be interviewed. It would also be especially beneficial to talk to people in law enforcement, specifically federal District Election Officers (“DEOs”) and local district attorneys, as well as civil and criminal defense attorneys.

Recommendation 2: Follow Up on Media Research

The media search conducted for this phase of the research was based on a list of search terms agreed upon by EAC consultants. Thousands of articles were reviewed and hundreds analyzed. Many of the articles contain allegations of fraud or intimidation. Similarly, many of the articles contain information about investigations into such activities or even charges brought. Additional media research should be conducted to determine what, if any, resolutions or further activity there was in each case.

Recommendation 3: Follow Up on Allegations Found in Literature Review

Many of the allegations made in the reports and books that were analyzed and summarized by EAC consultants were not substantiated and were certainly limited by the date of publication of those pieces. Despite this, such reports and books are frequently cited by various interested parties as evidence of fraud or intimidation. Further research should include follow up on the allegations discovered in the literature review.

Recommendation 4: Review Complaints Filed With “MyVote1” Voter Hotline

During the 2004 election and the statewide elections of 2005, the University of Pennsylvania led a consortium of groups and researchers in conducting the MyVote1 Project. This project involved using a 1-800 voter hotline where voters could call for poll location, be transferred to a local hotline, or leave a recorded message with a complaint. In 2004, this resulted in over 200,000 calls received and over 56,000 recorded complaints.

Further research should be conducted using the MyVote1 data with the cooperation of the project leaders. While perhaps not a fully scientific survey given the self-selection of the callers, the information regarding 200,000 complaints may provide a good deal of insight into the problems voters experienced, especially those in the nature of intimidation or suppression.

Recommendation 5: Further Review of Complaints Filed With U.S. Department of Justice

Although according to a recent GAO report the Voting Section of the Civil Rights Division of the Department of Justice has a variety in ways it tracks complaints of voter intimidation. Attempts should be made to obtain relevant data, including the telephone logs of complaints and information from the Interactive Case Management (ICM) system. Further research should also include a review and analysis of the DOJ/OPM observer and monitor field reports from Election Day.

Recommendation 6: Review Reports Filed By District Election Officers

Further research should include a review of the reports that must be filed by every District Election Officer to the Public Integrity Section of the Criminal Division of the Department of Justice. The DEOs play a central role in receiving reports of voter fraud and investigating and pursuing them. Their reports back to the Department would likely provide tremendous insight into what actually transpired during the last several elections. Where necessary, information could be redacted or made confidential.

Recommendation 7: Attend Ballot Access and Voting Integrity Symposium

Further activity in this area should include attending the next Ballot Access and Voting Integrity Symposium. At this conference, prosecutors serving as District Election Officers in the 94 U.S. Attorneys’ Offices obtain annual training on fighting election fraud and voting rights abuses. These conferences are sponsored by the Voting Section of the Civil Rights Division and the Public Integrity Section of the Criminal Division, and feature presentations by Civil Rights officials and senior prosecutors from the Public Integrity Section and the U.S. Attorneys’ Offices. By attending the symposium researchers could learn more about the following how District Election Officers are trained; how information about previous election and voting issues is presented; and how the Voting Rights Act, the criminal laws governing election fraud and intimidation, the

National Voter Registration Act, and the Help America Vote Act are described and explained to participants

Recommendation 8: Conduct Statistical Research

EAC should measure voter fraud and intimidation using interviews, focus groups, and a survey and statistical analysis of the results of these efforts. The sample should be based on the following factors:

- Ten locations that are geographically and demographically diverse where there have historically been many reports of fraud and/or intimidation;
- Ten locations (geographically and demographically diverse) that have not had many reports of fraud and/or intimidation;

EAC should also conduct a survey of elections officials, district attorneys, and district election officers. The survey sample should be large in order to be able to get the necessary subsets. The sample must include a random set of counties where there have and have not been a large number of allegations

Recommendation 9: Explore Improvements to Federal Law

Future researchers should review federal law to explore ways to make it easier to impose either civil or criminal penalties for acts of intimidation that do not necessarily involve racial animus and/or a physical or economic threat.

Recommendation 10: Use Observers to Collect Data on Election Day

Use observers to collect data regarding fraud and intimidation at the polls in on Election Day. There may be some limitations to the ability to conduct this type of research, including difficulty gaining access to polling places for the purposes of observation.

Recommendation 11: Study Absentee Ballot Fraud

Because absentee ballot fraud constitutes a large portion of election crimes, a stand-alone study of absentee ballot fraud should be conducted. Researchers should look at actual cases to see how absentee ballot fraud schemes are conducted in an effort to provide recommendations on more effective measures for preventing them.

Recommendation 12: Use Risk Analysis Methodology to Study Fraud

Conduct an analysis of what types of fraud people are most likely to commit. Researchers can use that risk analysis to rank the types of fraud based on the ease of commission and the impact of the fraud.

Recommendation 13: Conduct Research Using Database Comparisons

Researchers should compare information on databases to determine whether the voter rolls contain deceased persons and felons. In addition, the voter rolls can then be compared with the list of persons who voted to determine whether deceased voters or felons actually voted.

Recommendation 14: Conduct a Study of Deceptive Practices

The working group discussed the increasing use of deceptive practices, such as flyers with false and/or intimidating information, to suppress voter participation. A number of groups, such as the Department of Justice, the EAC, and organizations such as the Lawyers Committee for Civil Rights, keep phone logs regarding complaints of such practices. These logs should be reviewed and analyzed to see how such practices are being conducted and what can be done about them.

Recommendation 15: Study Use of HAVA Administrative Complaint Procedure as Vehicle for Measuring Fraud and Intimidation

EAC should study the extent to which states are actually utilizing the administrative complaint procedure mandated by HAVA. In addition, the EAC should study whether data collected through the administrative complaint procedure can be used as another source of information for measuring fraud and intimidation.

Recommendation 16: Examine the Use of Special Election Courts

Given that many state and local judges are elected, it may be worth exploring whether special election courts should be established to handle fraud and intimidation complaints before, during and after Election Day. Pennsylvania employs such a system and could investigate how well that system is working.

Accepted Recommendations

There has never been a comprehensive study that gathered data regarding all claims, charges and prosecutions of voting crimes. EAC feels that a comprehensive study is the most important research that it can offer the election community and the public. As such, EAC has adopted all or a part of six of the 16 recommendations made by EAC consultants and working group.

While several of the other recommendations could be used to obtain more anecdotal information regarding election crimes, EAC believes that what is needed is a comprehensive survey and study of the information available from investigatory agencies, prosecutorial bodies and courts on the number and types of complaints, charges and prosecutions of election crimes. Additional media reviews, additional interviews and the use of observers to collect information from voters on Election Day will only serve to continue the use of anecdotal data to report on election crimes. Hard data on complaints, charges and prosecutions exists and we should gather and use that data, rather than rely on the perceptions of the media or the members of the public as to what might be fraud or intimidation.

Some of the recommendations are beyond the scope of the current study. While election courts may be a reasonable conclusion to reach after we determine what volume and type of election crimes are being reported, charged or prosecuted, it is premature to embark on an analysis of that solution without more information. Last, some of the recommendations do not support a comprehensive study of election crimes. While a risk analysis might be appropriate in a smaller scale study, EAC desires to conduct a broader survey to avoid the existing problem of anecdotal and limited scope of information.

In order to further its goal of developing a comprehensive data set regarding election crimes, EAC intends to engage in the following research activities in studying the existence and enforcement of election crimes:

Survey Chief Election Officers Regarding Administrative Complaints

Likely sources of complaints concerning voting crimes are the administrative complaint processes that states were required to establish as a part of complying with HAVA. Those complaint procedures were required to be in place prior to a state receiving any funds under HAVA. Citizens are permitted to file complaints under those procedures with the state's chief election official and those complaints must be resolved within 60 days. The procedures also allow for alternative dispute resolution of claims.

In order to determine how many of these complaints allege the commission of election crimes, EAC will survey the states' chief election officers regarding complaints that have been filed, investigated and resolved since January 1, 2004. EAC will use the definition of election crimes provided above in this report in its survey so that data regarding a uniform set of offenses can be collected.

Survey State Election Crime Investigation Units Regarding Complaints Filed and Referred

Several chief state election officials have developed investigation units focused on receiving, investigating and referring complaints of election crimes. These units were established to bolster the abilities of state and local law enforcement to investigate allegations of election crimes. California, New York and Florida are just three examples of states that have these types of units.

EAC will use a survey instrument to gather information on the numbers and types of complaints that have been received by, investigated and ultimately referred to local or state law enforcement by election crime investigation units since January 1, 2004. This data will help us understand the pervasiveness of perceived fraud, as well as the number of claims that state election officials felt were meritorious of being referred to local and state law enforcement or prosecutorial agencies for further action.

Survey Law Enforcement and Prosecutorial Agencies Regarding Complaints and Charge of Voting Crimes

While voters, candidates and citizens may call national hotlines or the news media to report allegations of election crimes, it is those complaints that are made to law enforcement that can be investigated and ultimately prosecuted. Thus, it is critical to the study of election crimes to obtain statistics regarding the number and types of complaints that are made to law enforcement, how many of those complaints result in the perpetrator being charged or indicted, and how many of those charges or indictments result in pleas or convictions.

Thus, EAC will survey law enforcement and prosecutorial agencies at the local, state and federal level to determine the number and types of complaints, charges or indictments, and pleas or convictions of election crimes since January 1, 2004. In addition, EAC will seek to obtain an understanding of why some complaints are not charged or indicted and why some charges or indictments are not prosecuted.

Analyze Survey Data in Light of State Laws and Procedures

Once a reliable data set concerning the existence and enforcement of election crimes is assembled, a real analysis of the effectiveness of fraud prevention measures can be conducted. For example, data can be analyzed to determine if criminal activities related to elections are isolated to certain areas or regions of the country. Data collected from the election official surveys can be compared to the data regarding complaints, charges and prosecutions gathered from the respective law enforcement and prosecutorial agencies in each jurisdiction. The effect and/or effectiveness of provisions such as voter identification laws and challenger provisions can be assessed based on hard data from areas where these laws exist. Last, analyses such as the effectiveness of enforcement can be conducted in light of the resources available to the effort.

CONCLUSION

Election crimes are nothing new to our election process. The pervasiveness of these crimes and the fervor with which they have been enforced has created a great deal of debate among academics, election officials, and political pundits. Past studies of these issues have been limited in scope and some have been riddled with bias. These are issues that deserve comprehensive and nonpartisan review. EAC through its clearinghouse role will collect and analyze data on election crimes throughout the country. ^{These} ~~These~~ data not only will tell us what types of election crimes are committed and where fraud exists, but also inform us of what factors impact the existence, prevention and prosecution of election crimes.

Edefado's
*comment***EAC REPORT ON VOTER FRAUD AND VOTER INTIMIDATION STUDY****INTRODUCTION**

Voter fraud and intimidation is a phrase familiar to many voting-aged Americans. However, it means different things to different people. Voter fraud and intimidation is a phrase used to refer to crimes, civil rights violations, and at times even the correct application of state or federal laws to the voting process. Past study of this topic ^{have} ~~has~~ been as varied as its perceived meaning. In an effort to help understand the realities of voter fraud and voter intimidation in our elections, EAC has begun this phase one of a comprehensive study on election crimes. In this phase of its examination, EAC has developed a definition of election crimes and adopted some research methodology on how to assess the true existence and enforcement of election crimes in this country.

PURPOSE AND METHODOLOGY OF THE EAC STUDY

Section 241 of the Help America Vote Act of 2002 (HAVA) calls on the U.S. Election Assistance Commission (EAC) to research and study various issues related to the administration of elections. During Fiscal Year 2006, EAC began projects to research several of the listed topics. These topics for research were chosen in consultation with the EAC Standards Board and Board of Advisors. Voter fraud and voter intimidation was a topic that EAC as well as its advisory boards felt were important to study to help improve the administration of elections for federal office.

EAC began this study with the intention of identifying a common understanding of voter fraud and intimidation and devising a plan for a comprehensive study of these issues. This study was not intended to be a comprehensive review of existing voter fraud and voter intimidation actions, laws, or prosecutions. That type of research is well beyond the basic understanding that had to be established regarding what is commonly referred to as voter fraud and voter intimidation. Once that understanding was reached, a definition had to be crafted to refine, and in some cases limit, the scope of what reasonably can be researched and studied as evidence of voter fraud and voter intimidation. That definition will serve as the basis for recommending a plan for a comprehensive study of the area.

To accomplish these tasks, EAC employed two consultants, who along with EAC staff and interns conducted the research that forms the basis of this report. Consultants were chosen based upon their experience with the topic. In addition, consultants were chosen to assure a bipartisan representation in this study. The consultants and EAC staff were charged (1) to research the current state of information on the topics of voter fraud and voter intimidation, (2) to develop a uniform definition of voter fraud and voter intimidation, and (3) to propose recommended strategies for researching this subject.

EAC consultants reviewed existing studies, articles, reports and case law on voter fraud and intimidation. In addition, EAC consultants conducted interviews with selected

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experts in the field. Last, EAC consultants and staff presented their study to a working group that provided feed back. The working group participants were:

The Honorable Todd Rokita

Indiana Secretary of State
Member, EAC Standards Board and the
Executive Board of the Standards Board

Kathy Rogers

Georgia Director of Elections, Office of
the Secretary of State
Member, EAC Standards Board

J.R. Perez

Guadalupe County Elections
Administrator, Texas

Barbara Arnwine

Executive Director, Lawyers Committee
for Civil Rights under Law
Leader of Election Protection Coalition

Benjamin L. Ginsberg

Partner, Patton Boggs LLP
Counsel to national Republican
campaign committees and Republican
candidates

Robert Bauer

Chair of the Political Law Practice at the
law firm of Perkins Coie, District of
Columbia
National Counsel for Voter Protection,
Democratic National Committee

Mark (Thor) Hearne II

Partner-Member, Lathrop & Gage, St
Louis, Missouri
National Counsel to the American
Center for Voting Rights

Barry Weinberg

Former Deputy Chief and Acting Chief,
Voting Section, Civil Rights Division,
U.S. Department of Justice

Technical Advisor:

Craig Donsanto

Director, Election Crimes Branch, U.S.
Department of Justice

Throughout the process, EAC staff assisted the consultants by providing statutes and cases on this subject as well as supervision on the direction, scope, and product of this research.

The consultants drafted a report for EAC that included their summaries of existing laws, cases, studies and reports on voter fraud and intimidation as well as summaries of the interviews that they conducted. The draft report also provided a definition of voter fraud and intimidation and made certain recommendations developed by the consultants or by the working group on how to pursue further study of this subject. This document was ~~vetted and~~ edited to produce this final report.

EXISTING INFORMATION ABOUT FRAUD AND INTIMIDATION

To begin our study of voter fraud and voter intimidation, EAC consultants reviewed the current body of information on voter fraud and intimidation. What the world knows about these issues comes largely from a very limited body of reports, articles and books. There are volumes of case law and statutes in the various states that also impact our understanding of what actions or inactions are legally considered fraud or intimidation.

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Last, there is anecdotal information available through media reports and interviews with persons who have administered elections, prosecuted fraud, and studied these problems. All of these resources were used by EAC consultants to provide an introductory look at the available knowledge of voter fraud and voter intimidation.

Reports and Studies of Voter Fraud and Intimidation

Over the years, there have been a number of studies conducted about the concepts of voter fraud and voter intimidation. EAC reviewed many of these studies and reports to develop a base-line understanding of the information that is currently available about voter fraud and voter intimidation. EAC consultants reviewed the following articles, reports and books, summaries of which are available in Appendix “___”:

Articles and Reports

- People for the American Way and the NAACP, “The Long Shadow of Jim Crow,” December 6, 2004.
- Laughlin McDonald, “The New Poll Tax,” *The American Prospect* vol. 13 no. 23, December 30, 2002.
- Wisconsin Legislative Audit Bureau, “An Evaluation: Voter Registration Elections Board” Report 05-12, September, 2005.
- Milwaukee Police Department, Milwaukee County District Attorney’s Office, Federal Bureau of Investigation, United States Attorney’s Office “Preliminary Findings of Joint Task Force Investigating Possible Election Fraud,” May 10, 2005.
- National Commission on Federal Election Reform, “Building Confidence in U.S. Elections,” Center for Democracy and Election Management, American University, September 2005.
- The Brennan Center for Justice at NYU School of Law and Spencer Overton, Commissioner and Law Professor at George Washington University School of Law “Response to the Report of the 2005 Commission on Federal Election Reform,” September 19, 2005.
- Chandler Davidson, Tanya Dunlap, Gale Kenny, and Benjamin Wise, “Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression – or Both?” A Report to the Center for Voting Rights & Protection, September, 2004.
- Alec Ewald, “A Crazy Quilt of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law,” The Sentencing Project, November 2005.

- American Center for Voting Rights “Vote Fraud, Intimidation and Suppression in the 2004 Presidential Election,” August 2, 2005.
- The Advancement Project, “America’s Modern Poll Tax: How Structural Disenfranchisement Erodes Democracy” November 7, 2001
- The Brennan Center and Professor Michael McDonald “Analysis of the September 15, 2005 Voter Fraud Report Submitted to the New Jersey Attorney General,” The Brennan Center for Justice at NYU School of Law, December 2005.
- Democratic National Committee, “Democracy at Risk: The November 2004 Election in Ohio,” DNC Services Corporation, 2005
- Public Integrity Section, Criminal Division, United States Department of Justice, "Report to Congress on the Activities and Operations of the Public Integrity Section for 2002."
- Public Integrity Section, Criminal Division, United States Department of Justice, "Report to Congress on the Activities and Operations of the Public Integrity Section for 2003."
- Public Integrity Section, Criminal Division, United States Department of Justice, "Report to Congress on the Activities and Operations of the Public Integrity Section for 2004."
- Craig Donsanto, "The Federal Crime of Election Fraud," Public Integrity Section, Department of Justice, prepared for Democracy.Ru, n.d., at http://www.democracy.ru/english/library/international/eng_1999-11.html
- People for the American Way, Election Protection 2004, Election Protection Coalition, at <http://www.electionprotection2004.org/edaynews.htm>
- Craig Donsanto, "Prosecution of Electoral Fraud under United State Federal Law," *IFES Political Finance White Paper Series*, IFES, 2006.
- General Accounting Office, "Elections: Views of Selected Local Election Officials on Managing Voter Registration and Ensuring Eligible Citizens Can Vote," Report to Congressional Requesters, September 2005.
- Lori Minnite and David Callahan, "Securing the Vote: An Analysis of Election Fraud," Demos: A Network of Ideas and Action, 2003.

- People for the American Way, NAACP, Lawyers Committee for Civil Rights, "Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections," December 2004.

Books

- John Fund, *Stealing Elections: How Voter Fraud Threatens Our Democracy*, Encounter Books, 2004.
- Andrew Gumbel, *Steal this Vote: Dirty Elections and the Rotten History of Democracy in American*, Nation Books, 2005.
- Tracy Campbell, *Deliver the Vote: A History of Election Fraud, An American Political Tradition – 1742-2004*, Carroll & Graf Publishers, 2005.
- David E. Johnson and Jonny R. Johnson, *A Funny Thing Happened on the Way to the White House: Foolhardiness, Folly, and Fraud in the Presidential Elections, from Andrew Jackson to George W. Bush*, Taylor Trade Publishing, 2004.
- Mark Crispin Miller, *Fooled Again*, Basic Books, 2005.

During our review of these documents, we learned a great deal about the type of research that has been conducted in the past concerning voter fraud and voter intimidation. None of the studies or reports was based on a comprehensive study, survey or review of all allegations, prosecutions or convictions of state or federal crimes related to voter fraud or voter intimidation. Most reports focused on a limited number of case studies or instances of alleged voter fraud or intimidation. For example, "Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections," a report produced by the People for the American Way, focused exclusively on citizen reports of fraud or intimidation to the Election Protection program during the 2004 presidential election. Similarly, reports produced annually by the Department of Justice, Public Integrity Division, deal exclusively with crimes reported to and prosecuted by the United States Attorneys and/or the Department of Justice through the Public Integrity Section.

It is also apparent from a review of these articles and books that there is no consensus on the pervasiveness of voter fraud and voter intimidation. Some reports, such as "Building Confidence in U.S. Elections," suggest that there is little or no evidence of extensive fraud in U.S. elections or of multiple voting. This conflicts directly with other reports, such as the "Preliminary findings of Joint Task Force Investigating Possible Election Fraud," produced by the Milwaukee Police Department, Milwaukee County District Attorney's Office, FBI and U.S. Attorney's Office. That report cited evidence of more than 100 individual instances of suspected double-voting, voting in the name of persons who likely did not vote, and/or voting using a name believed to be fake.

Voter intimidation is also a topic of some debate. Generally speaking, there is little agreement on what constitutes actionable voter intimidation. Some studies and reports cover only intimidation that involves physical or financial threats, while others cover non-criminal intimidation, ^{and} even legal practices that they allege suppress the vote.

One point of agreement is that absentee voting and voter registration by third-party groups create opportunities for fraud. A number of studies cited circumstances in which voter registration drives have falsified voter registration applications or have destroyed voter registration applications of voters of a certain party. Others conclude that paying persons per voter registration application creates the opportunity and perhaps the incentive for fraud.

Is there anything we can say about absentee fraud? details focus only on VR and give no detail on absentee

Interviews with Experts

In addition to reviewing prior studies and reports on voter fraud and intimidation, EAC consultants interviewed a number of persons regarding their experiences and research of voter fraud and voter intimidation. Persons interviewed included

Wade Henderson

Executive Director,
Leadership Conference for Civil Rights

Rebecca Vigil-Giron

Secretary of State, New Mexico

Wendy Weiser

Deputy Director,
Democracy Program, The Brennan
Center

Sarah Ball Johnson

Executive Director,
State Board of Elections, Kentucky

William Groth

Attorney for the plaintiffs in the Indiana
voter identification litigation

Stephen Ansolobehere

Massachusetts Institute of Technology

Chandler Davidson

Rice University

Lori Minnite

Barnard College, Columbia University

Tracey Campbell

Author, *Deliver the Vote*

Neil Bradley

ACLU Voting Rights Project

Douglas Webber

Assistant Attorney General, Indiana

Nina Perales

Counsel,
Mexican American Legal Defense and
Education Fund

Heather Dawn Thompson

Director of Government Relations,
National Congress of American Indians

Pat Rogers

Attorney, New Mexico

Jason Torchinsky

Assistant General Counsel,
American Center for Voting Rights

Robin DeJarnette
Executive Director,
American Center for Voting Rights

Evelyn Stratton
Justice
Supreme Court of Ohio

Harry Van Sickle
Commissioner of Elections,
Pennsylvania

Tony Sirvello
Executive Director
International Association of Clerks,
Recorders, Election Officials and
Treasurers

Joseph Sandler
Counsel
Democratic National Committee

Joseph Rich
Former Director
Voting Section, Civil Rights Division
U.S. Department of Justice

John Ravitz
Executive Director
New York City Board of Elections

Craig Donsanto
Director, Public Integrity Section
U.S. Department of Justice

Sharon Priest
Former Secretary of State, Arkansas

Kevin Kennedy
Executive Director
State Board of Elections, Wisconsin

John Tanner
Director
Voting Section, Civil Rights Division
U.S. Department of Justice

These interviews in large part confirmed the conclusions that were gleaned from the articles, reports and books that were analyzed. For example, the interviewees largely agreed that absentee balloting is subject to the greatest proportion of fraudulent acts, followed by vote buying and voter registration fraud. They similarly pointed to voter registration drives by third-party groups as a source of fraud, particularly when the workers are paid per registration. Many asserted that impersonation of voters is probably the least frequent type of fraud, citing as reasons that it was the most likely type of fraud to be discovered and that there are stiff penalties associated with this type of fraud.

> awkward sentence

Interviewees differed on what they believe constitutes actionable voter intimidation. Law enforcement and prosecutorial agencies tend to look to the criminal definitions of voter intimidation which generally require some threat of physical or financial harm. On the other hand, voter rights advocates tended to point to activities such as challenger laws, voter identification laws, the location of polling places, and distribution of voting machines as activities that can constitute voter intimidation.

Those interviewed also expressed opinions on the enforcement of voter fraud and voter intimidation laws. States have varying authorities to enforce these laws. In some states, enforcement is left to the county or district attorney, and in others enforcement is managed by the state's attorney general. Regardless, voter fraud and voter intimidation are difficult to prove and require resources and time that local law enforcement and prosecutorial agencies do not have. Federal law enforcement and prosecutorial agencies

have more time and resources but have limited jurisdiction. They can only prosecute crimes related to elections involving federal candidates. Those interviewed differed on the effectiveness of the current system of enforcement, including those that allege that prosecutions are not sufficiently aggressive and those that feel that the current laws are sufficient for prosecuting fraud and intimidation.

A summary of the each of the interviews conducted is attached as Appendix “___”.

Case Law and Statutes

Consultants reviewed over 40,000 cases that were identified using a series of search terms related to voter fraud and voter intimidation. The majority of these cases came from appeal courts. This is not a surprising situation, since most cases that are publicly reported come from courts of appeal. Very few cases that are decided at the district court level are reported for public review.

Very few of the identified cases were applicable to this study. Of those that were applicable, no apparent thematic pattern emerged. However, it did seem that the greatest number of cases reported on fraud and intimidation have shifted from past patterns of stealing votes to present problems with voter registration, voter identification, the proper delivery and counting of absentee and overseas ballots, provisional voting, vote buying and challenges to felon eligibility.

A listing of the cases reviewed in this study is attached as Appendix “___”.

Media Reports

EAC consultants reviewed thousands of media reports concerning a wide variety of potential voter fraud or voter intimidation, including:

- absentee ballot fraud,
- voter registration fraud,
- voter intimidation and suppression,
- deceased voters,
- multiple voting,
- felons voting,
- non-citizens voting,
- vote buying,
- deceptive practices, and
- fraud by election officials.

While these reports showed that there were a large number of allegations of voter fraud and voter intimidation, they provided much less information as to whether the allegations were ever formalized as complaints to law enforcement, whether charges were filed, whether prosecutions ensued, and whether any convictions were made. The media reports were enlightening as to the pervasiveness of complaints of fraud and intimidation

throughout the country, the correlation between fraud allegations and the perception that the state was a “battleground” or “swing” state, and the fact that there were reports of almost all types of voter fraud and voter intimidation. However, these reports do not provide much data for analysis as to the number of complaints, charges, and prosecutions of voter fraud and intimidation throughout the country.

DEFINITION OF ELECTION CRIMES

From our study of available information on voter fraud and voter intimidation, we have learned that these terms mean many things to many different people. These terms are used casually to refer to anything from vote buying to refusing to register a voter to falsifying voter registration applications. Upon further inspection, however, it is apparent that there is no common understanding of what is and what is not “voter fraud” and “voter intimidation.” Some think of voter fraud and voter intimidation only as criminal acts, while others include actions that may constitute civil wrongs, civil rights violations, and even legal and appropriate activities. In order to come up with a common definition and list of activities that can be studied, EAC assessed the appropriateness of the terminology that is currently in use and applied certain factors to limit the scope and reach of what can and will be studied by EAC in the future.

New Terminology

The phrase “voter fraud” is really a misnomer for a concept that is much broader. “Fraud” is a concept that connotes an intentional act of deception, which may constitute either a criminal act or civil tort depending upon the willfulness of the act.

Fraud, n. 1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. • Fraud is usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime.

indent → Black’s Law Dictionary, Eighth Edition, p. 685.

A “voter” is a person who is eligible to and engages in the act of voting. Black’s Law Dictionary, Eighth Edition, p. 1608. Using these terms to form a definition of “voter fraud,” it means fraudulent or deceptive acts committed by the voter or in which the voter is the victim. Thus, a voter who intentionally provides false information on a voter registration application or intentionally impersonates another registered voter and attempts to vote for that person would be committing “voter fraud.” Similarly, a person who knowingly provides false information to a voter about the location of the voter’s polling place commits fraud on the voter.

The phrase “voter fraud” does not capture a myriad of other criminal acts that are related to elections which are not perpetrated by the voter and/or do not involve an act of deception. For example, “voter fraud” does not capture actions or willful inaction by candidates and election workers. When an election official willfully and knowingly

refuses to register to vote an otherwise legally eligible person it is a crime. This is a crime that involves neither the voter nor an act of deception.

To further complicate matters, the phrases “voter fraud” and “voter intimidation” are used to refer to actions or inactions that are criminal as well as those that are potentially civil wrongs and even those that are legal. Obviously, criminal acts and civil wrongs are pursued in a very different manner. Criminal acts are prosecuted by the local, state or federal government. Generally, civil wrongs are prosecuted by the individual who believes that they were harmed. In some cases, when civil rights are involved, the ~~Civil~~ ^{Civil Rights} Division of the Department of Justice may become involved.

The goal of this study was to develop a common definition of what is generically referred to as “voter fraud” and “voter intimidation” that would serve as the basis of a future, comprehensive study of the existence of these problems. In order to meet that goal, we recognize that the current terminology does not accurately represent the spectrum of activities that we desire to study. Furthermore, we recognize that the resources, both financial and human capital, needed to study allegations and prosecutions of criminal acts, suits involving civil torts, and allegations of potential voter suppression through the use of legal election processes are well beyond the resources available to EAC. As such, EAC has defined “election crimes,” a phrase that captures all crimes related to the ~~voter registration and voting processes~~.

What is an Election Crime for Purposes of this Study

Election crimes are intentional acts or willful failures to act, prohibited by state or federal law, that are designed to cause ineligible persons to participate in the election process; eligible persons to be excluded from the election process; ineligible votes to be cast in an election; eligible votes not to be cast or counted; or other interference with or invalidation of election results. Election crimes generally fall into one of four categories: acts of deception; acts of coercion; acts of damage or destruction; and failures or refusals to act.

~~Generally speaking,~~ Election crimes can be committed by voters, candidates, election officials, or any other members of the public that desire to criminally impact the result of an election. However, crimes that are based upon knowing or willful failure to act assume that a duty to act exists. Election officials have affirmative duties to act with regard to elections. By and large, other groups and individuals do not have such duties.

The victim of an election crime can be a voter, a group of voters, or the public, in general. Election crimes can occur during any stage of the election process, including but not limited to qualification of candidates; voter registration; campaigning; voting system preparation and programming; voting either early, absentee, or election day; vote tabulation; recounts; and recalls.

The following are examples of activities that may constitute election crimes. This list is not intended to be exhaustive, but is representative of what states and the federal government consider criminal activity related to elections.

Acts of Deception

- Knowingly causing to be mailed or distributed, or knowingly mailing or distributing, literature that includes false information about the voter's precinct or polling place, regarding the date and time of the election or regarding a candidate;
- Possessing an official ballot outside the voting location, unless the person is an election official or other person authorized by law or local ordinance^{to} possess a ballot outside of the polling location;
- Making, or knowingly possessing, a counterfeit of an official election ballot;
- Signing a name other than his/her own to a petition proposing an initiative, referendum, recall, or nomination of a candidate for office;
- Knowingly signing more than once for the proposition, question, or candidate ~~at~~ⁱⁿ one election;
- Signing a petition proposing an initiative or referendum when the signer is not a qualified voter⁺;
- Voting or attempting to vote in the name of another person;
- Voting or attempting to vote more than once at the same election;
- Intentionally making a false affidavit, swearing falsely, or falsely affirming under an oath required by a statute regarding their voting status, including when registering to vote, requesting an absentee ballot or presenting to vote in person;
- Registering to vote without being entitled to register;
- Knowingly making a material false statement on an application for voter registration or re-registration; and
- Voting or attempting to vote in an election after being disqualified or when the person knows that he/she is not eligible to vote.

~~Acts of Deception~~
Acts of Coercion

- Using, threatening to use, or causing to be used force, coercion, violence, restraint, or inflicting, threatening to inflict, or causing to be inflicted damage harm, or loss, upon or against another person to induce or compel that person to vote or refrain from voting or to register or refrain from registering to vote;
- Knowingly paying, offering to pay, or causing to be paid money or other valuable thing to a person to vote or refrain from voting for a candidate or for or against an election proposition or question;
- Knowingly soliciting or encouraging a person who is not qualified to vote in an election;
- Knowingly challenging a person's right to vote without probable cause or on fraudulent grounds, or engaging in mass, indiscriminate, and groundless challenging of voters solely for the purpose of preventing voter from voting or ~~to~~ delay the process of voting;
- As an employer, attempting by coercion, intimidation, threats to discharge or to lessen the remuneration of an employee, to influence his vote in any election, or who requires or demands an examination or inspection by himself or another of an employee's ballot;

- Soliciting, accepting, or agreeing to accept money or other valuable thing in exchange for signing or refraining from signing a petition proposing an initiative;
- Inducing or attempting to induce an election official to fail in the official's duty by force, threat, intimidation, or offers of reward;
- Directly or through any other person advancing, paying, soliciting, or receiving or causing to be advanced, paid, solicited, or received, any money or other valuable consideration to or for the use of any person in order to induce a person not to become or to withdraw as a candidate for public office; and
- Soliciting, accepting, or agreeing to accept money or other valuable thing in exchange for registering to vote.

Acts of Damage or Destruction

- Removing or destroying any of the supplies or other conveniences placed in the voting booths or compartments for the purpose of enabling the voter to vote his or her ballot;
- Removing, tearing down, or defacing election materials, instructions or ballots;
- Fraudulently altering or changing the vote of any elector, by which such elector is prevented from voting as he intended;
- Knowingly removing, altering, defacing or covering any political sign of any candidate for public office for a prescribed period prior to and following the election;
- Intentionally changing, attempting to change, or causing to be changed an official election document including ballots, tallies, and returns; and
- Intentionally delaying, attempting to delay, or causing to be delayed the sending of certificate, register, ballots, or other materials whether original or duplicate, required to be sent by jurisdictional law.

Failure or Refusal to Act

- Intentionally failing to perform an election duty, or knowingly committing an unauthorized act with the intent to effect the election;
- Knowingly permitting, making, or attempting to make a false count of election returns;
- Intentionally concealing, withholding, or destroying election returns or attempts to do so;
- Marking a ballot by folding or physically altering the ballot so as to recognize the ballot at a later time;
- Attempting to learn or actually and unlawfully learning how a voter marked a ballot;
- Distributing or attempting to distribute election material knowing it to be fraudulent;
- Knowingly refusing to register a person who is entitled to register under the rules of that jurisdiction; and
- Knowingly refusing to allow an eligible voter to cast his/her ballot.

What is not an Election Crime for Purposes of this Study

There are some actions or inactions that may constitute crimes or civil wrongs that we do not include in our definition of “election crimes.” All crimes or civil violations related to campaign finance reporting either at the state or federal level are not “election crimes” for purposes of this study and any future study conducted by EAC. Similarly, criminal acts that are unrelated to elections, voting, or voter registration are not “election crimes,” even when those offenses occur in a polling place, voter registration office, or a candidate’s office or appearance. For example, an assault or battery that results from a fight in a polling place or at a candidate’s office is not an election crime. Similarly, violations of ethical provisions such as the Hatch Act are not “election crimes.” Last, actions that do not rise to the level of criminal activity, that is a misdemeanor, relative felony or felony, are not “election crimes.”

RECOMMENDATIONS ON HOW TO STUDY ELECTION CRIMES

As a part of its study, EAC sought recommendations on ways that EAC can study the existence of election crimes. EAC consultants developed recommendations. In addition, the working group and some of the persons interviewed as a part of this study provided recommendations.

Recommendation 1: Conduct More Interviews

Future activity in this area should include conducting additional interviews. In particular, more election officials from all levels of government, parts of the country, and parties should be interviewed. It would also be especially beneficial to talk to people in law enforcement, specifically federal District Election Officers (“DEOs”) and local district attorneys, as well as civil and criminal defense attorneys.

Recommendation 2: Follow Up on Media Research

The media search conducted for this phase of the research was based on a list of search terms agreed upon by EAC consultants. Thousands of articles were reviewed and hundreds analyzed. Many of the articles contain allegations of fraud or intimidation. Similarly, many of the articles contain information about investigations into such activities or even charges brought. Additional media research should be conducted to determine what, if any, resolutions or further activity there was in each case.

Recommendation 3: Follow Up on Allegations Found in Literature Review

Many of the allegations made in the reports and books that were analyzed and summarized by EAC consultants were not substantiated and were certainly limited by the date of publication of those pieces. Despite this, such reports and books are frequently cited by various interested parties as evidence of fraud or intimidation. Further research should include follow up on the allegations discovered in the literature review.

Recommendation 4: Review Complaints Filed With “MyVote1” Voter Hotline

During the 2004 election and the statewide elections of 2005, the University of Pennsylvania led a consortium of groups and researchers in conducting the MyVote1 Project. This project involved using a ~~1-800~~^{1-800 toll free} voter hotline where voters could call for poll location, be transferred to a local hotline, or leave a recorded message with a complaint. In 2004, this resulted in over 200,000 calls received and over 56,000 recorded complaints.

Further research should be conducted using the MyVote1 data with the cooperation of the project leaders. While perhaps not a fully scientific survey given the self-selection of the callers, the information regarding 200,000 complaints may provide a good deal of insight into the problems voters experienced, especially those in the nature of intimidation or suppression.

} not scientific
at all!
definite bias

Recommendation 5: Further Review of Complaints Filed With U.S. Department of Justice

Although according to a recent GAO report the Voting Section of the Civil Rights Division of the Department of Justice has a variety ~~in~~^{of} ways it tracks complaints of voter intimidation, Attempts should be made to obtain relevant data, including the telephone logs of complaints and information from the Interactive Case Management (ICM) system. Further research should also include a review and analysis of the DOJ/OPM observer and monitor field reports from Election Day.

Recommendation 6: Review Reports Filed By District Election Officers

Further research should include a review of the reports that must be filed by every District Election Officer to the Public Integrity Section of the Criminal Division of the Department of Justice. The DEOs play a central role in receiving reports of voter fraud and investigating and pursuing them. Their reports back to the Department would likely provide tremendous insight into what actually transpired during the last several elections. Where necessary, information could be redacted or made confidential.

→ election crimes?

Recommendation 7: Attend Ballot Access and Voting Integrity Symposium

Further activity in this area should include attending the next Ballot Access and Voting Integrity Symposium. At this conference, prosecutors serving as District Election Officers in the 94 U.S. Attorneys' Offices obtain annual training on fighting election fraud and voting rights abuses. These conferences are sponsored by the Voting Section of the Civil Rights Division and the Public Integrity Section of the Criminal Division, and feature presentations by Civil Rights officials and senior prosecutors from the Public Integrity Section and the U.S. Attorneys' Offices. By attending the symposium researchers could learn more about the following: how District Election Officers are trained; how information about previous election and voting issues ~~is~~^{are} presented; and how the Voting Rights Act, the criminal laws governing election fraud and intimidation, the

National Voter Registration Act, and the Help America Vote Act are described and explained to participants.

Recommendation 8: Conduct Statistical Research

not statistical research

EAC should measure voter fraud and intimidation using interviews, focus groups, and a survey and statistical analysis of the results of these efforts. The sample should be based on the following factors:

- Ten locations that are geographically and demographically diverse where there have historically been many reports of fraud and/or intimidation;
- Ten locations (geographically and demographically diverse) that have not had many reports of fraud and/or intimidation;

EAC should also conduct a survey of elections officials, district attorneys, and district election officers. The survey sample should be large in order to be able to get the necessary subsets. The sample must include a random set of counties where there have and have not been a large number of allegations

what data would be collected?

Recommendation 9: Explore Improvements to Federal Law

Future researchers should review federal law to explore ways to make it easier to impose either civil or criminal penalties for acts of intimidation that do not necessarily involve racial animus and/or a physical or economic threat.

Recommendation 10: Use Observers to Collect Data on Election Day

Use observers to collect data regarding fraud and intimidation at the polls ~~in~~ on Election Day. There may be some limitations to the ability to conduct this type of research, including difficulty gaining access to polling places for the purposes of observation.

Fed Gov already has observers

Recommendation 11: Study Absentee Ballot Fraud

Because absentee ballot fraud constitutes a large portion of election crimes, a stand-alone study of absentee ballot fraud should be conducted. Researchers should look at actual cases to see how absentee ballot fraud schemes are conducted in an effort to provide recommendations on more effective measures for preventing them.

Recommendation 12: Use Risk Analysis Methodology to Study Fraud

Conduct an analysis of what types of fraud people are most likely to commit. Researchers can use that risk analysis to rank the types of fraud based on the ease of commission and the impact of the fraud.

Recommendation 13: Conduct Research Using Database Comparisons

Researchers should compare information on databases to determine whether the voter rolls contain deceased persons and felons. In addition, the voter rolls can then be compared with the list of persons who voted to determine whether deceased voters or felons actually voted.

HAVA
Issues

Recommendation 14: Conduct a Study of Deceptive Practices

The working group discussed the increasing use of deceptive practices, such as flyers with false and/or intimidating information, to suppress voter participation. A number of groups, such as the Department of Justice, the EAC, and organizations such as the Lawyers Committee for Civil Rights, keep phone logs regarding complaints of such practices. These logs should be reviewed and analyzed to see how such practices are being conducted and what can be done about them.

Recommendation 15: Study Use of HAVA Administrative Complaint Procedures as Vehicle for Measuring Fraud and Intimidation

EAC should study the extent to which states are actually utilizing the administrative complaint procedure mandated by HAVA. In addition, the EAC should study whether data collected through the administrative complaint procedure can be used as another source of information for measuring fraud and intimidation.

Recommendation 16: Examine the Use of Special Election Courts

Given that many state and local judges are elected, it may be worth exploring whether special election courts should be established to handle fraud and intimidation complaints before, during and after Election Day. Pennsylvania employs such a system and could investigate how well that system is working.

Accepted Recommendations

There has never been a comprehensive study that gathered data regarding all claims, charges and prosecutions of voting crimes. EAC feels that a comprehensive study is the most important research that it can offer the election community and the public. As such, EAC has adopted all or a part of six of the 16 recommendations made by EAC consultants and working group.

While several of the other recommendations could be used to obtain more anecdotal information regarding election crimes, EAC believes that what is needed is a comprehensive survey and study of the information available from investigatory agencies, prosecutorial bodies and courts on the number and types of complaints, charges and prosecutions of election crimes. Additional media reviews, additional interviews and the use of observers to collect information from voters on Election Day will only serve to continue the use of anecdotal data to report on election crimes. Hard data on complaints, charges and prosecutions exists and we should gather and use that data, rather than rely on the perceptions of the media or the members of the public as to what might be fraud or intimidation.

Some of the recommendations are beyond the scope of the current study. While election courts may be a reasonable conclusion to reach after we determine what volume and type of election crimes are being reported, charged or prosecuted, it is premature to embark on an analysis of that solution without more information. Last, some of the recommendations do not support a comprehensive study of election crimes. While a risk analysis might be appropriate in a smaller scale study, EAC desires to conduct a broader survey to avoid the existing problem of anecdotal and limited scope of information.

In order to further its goal of developing a comprehensive data set regarding election crimes, EAC intends to engage in the following research activities in studying the existence and enforcement of election crimes:

Survey Chief Election Officers Regarding Administrative Complaints

Likely sources of complaints concerning ^{election} ~~voting~~ crimes are the administrative complaint ~~procedures~~ ^{processes} that states were required to establish as a part of complying with HAVA. Those complaint procedures were required to be in place prior to a state receiving any funds under HAVA. Citizens are permitted to file complaints under those procedures with the state's chief election official and those complaints must be resolved within 60 days. The procedures also allow for alternative dispute resolution of claims.

In order to determine how many of these complaints allege the commission of election crimes, EAC will survey the states' chief election officers regarding complaints that have been filed, investigated and resolved since January 1, 2004. EAC will use the definition of election crimes provided above in this report in its survey so that data regarding a uniform set of offenses can be collected.

Survey State Election Crime Investigation Units Regarding Complaints Filed and Referred

Several chief state election officials have developed investigation units focused on receiving, investigating and referring complaints of election crimes. These units were established to bolster the abilities of state and local law enforcement to investigate allegations of election crimes. California, New York and Florida are just three examples of states that have these types of units.

EAC will use a survey instrument to gather information on the numbers and types of complaints that have been received by, investigated, and ultimately referred to local or state law enforcement by election crime investigation units since January 1, 2004. This data will help us understand the pervasiveness of perceived fraud, as well as the number of claims that state election officials felt were meritorious of being referred to local and state law enforcement or prosecutorial agencies for further action.

Survey Law Enforcement and Prosecutorial Agencies Regarding Complaints and Charge of Voting Crimes

While voters, candidates and citizens may call national hotlines or the news media to report allegations of election crimes, it is those complaints that are made to law enforcement that can be investigated and ultimately prosecuted. Thus, it is critical to the study of election crimes to obtain statistics regarding the number and types of complaints that are made to law enforcement, how many of those complaints result in the perpetrator being charged or indicted, and how many of those charges or indictments result in pleas or convictions.

Thus, EAC will survey law enforcement and prosecutorial agencies at the local, state and federal level to determine the number and types of complaints, charges or indictments, and pleas or convictions of election crimes since January 1, 2004. In addition, EAC will seek to obtain an understanding of why some complaints are not charged or indicted and why some charges or indictments are not prosecuted.

Analyze Survey Data in Light of State Laws and Procedures

Once a reliable data set concerning the existence and enforcement of election crimes is assembled, a real analysis of the effectiveness of fraud prevention measures can be conducted. For example, data can be analyzed to determine if criminal activities related to elections are isolated to certain areas or regions of the country. Data collected from the election official surveys can be compared to the data regarding complaints, charges and prosecutions gathered from the respective law enforcement and prosecutorial agencies in each jurisdiction. The effect and/or effectiveness of provisions such as voter identification laws and challenger provisions can be assessed based on hard data from areas where these laws exist. Last, analyses such as the effectiveness of enforcement can be conducted in light of the resources available to the effort.

CONCLUSION

Election crimes are nothing new to our election process. The pervasiveness of these crimes and the fervor with which they have been enforced has created a great deal of debate among academics, election officials, and political pundits. Past studies of these issues have been limited in scope and some have been riddled with bias. These are issues that deserve comprehensive and nonpartisan review. EAC, through its clearinghouse role, will collect and analyze data on election crimes throughout the country. ^{This} data not only will tell us what types of election crimes are committed ~~and where fraud exists~~, but also inform us of what factors impact the existence, prevention and prosecution of election crimes.

ADLD
Comments



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— do a
tense check
— do an
EAC vs.
check

EXECUTIVE SUMMARY

The Help America Vote Act of 2002 (HAVA) requires the U.S. Election Assistance Commission (EAC) to study a host of topics, including “voting fraud” and “voter intimidation.” In 2005, EAC embarked on an initial review of the existing knowledge of voting fraud and voter intimidation. The goal of that study was to develop a working definition of “voting fraud” and “voter intimidation” and to identify research methodology to conduct a comprehensive, nationwide study of these topics.

EAC staff along with two, bipartisan consultants reviewed the existing information available about voting fraud and voter intimidation, including reading articles, books and reports; interviewing subject matter experts; reviewing media reports of fraud and intimidation; and studying reported cases of prosecutions of these types of crimes. It is clear from this review that there is a great deal of debate on the pervasiveness of fraud in elections as well as what constitute the most common acts of fraud or intimidation. There is also no apparent consensus on the meaning of the phrases “voting fraud” and “voter intimidation.” Some think of voting fraud and voter intimidation only as criminal acts, while others include actions that may constitute civil wrongs, civil rights violations, and even legal activities.

In order to facilitate future study of these topics, EAC developed a working definition of “election crimes.” “Election crimes” are intentional acts or willful failures to act, prohibited by state or federal law, that are designed to cause ineligible persons to participate in the election process; eligible persons to be excluded from the election process; ineligible votes to be cast in an election; eligible votes not to be cast or counted; or other interference with or invalidation of election results. Election crimes generally fall into one of four categories: acts of deception, acts of coercion, acts of damage or destruction, and failures or refusals to act.

From EAC’s review of existing information on the issue, it was apparent that there have been a number of studies that touched on various topics and regions of the country concerning voting fraud and intimidation, but that there had never been a comprehensive, nationwide study of these topics. EAC will conduct further research to provide a comprehensive, nationwide look at “election crimes.” Future EAC study of this topic will focus on election-related, criminal activity and will not include acts that are exclusively civil wrongs, campaign finance violations, and violations of ethical provisions. EAC will study these concepts by surveying the states’ chief election officials about complaints they received through their administrative complaint processes, election crime investigation units regarding complaints received and those referred to law enforcement, and law enforcement and prosecutorial agencies regarding complaints received and charges filed.

These are the
6 EAC topics



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INTRODUCTION

Voting fraud and voter intimidation are phrases familiar to many voting-aged Americans. However, they mean different things to different people. Voting fraud and voter intimidation are phrases used to refer to crimes, civil rights violations, and, at times, even the lawful application of state or federal laws to the voting process. Past study of these topics has been as varied as its perceived meaning. In an effort to help understand the realities of voting fraud and voter intimidation in our elections, the U.S. Election Assistance Commission (EAC) has begun this, phase one, of a comprehensive study on election crimes. In this phase of its examination, EAC has developed a working definition of election crimes and adopted research methodology on how to assess the existence and enforcement of election crimes in the United States.

PURPOSE AND METHODOLOGY OF THE EAC STUDY

Section 241 of the Help America Vote Act of 2002 (HAVA) calls on the EAC to research and study various issues related to the administration of elections. During Fiscal Year 2006, EAC began projects to research several of the listed topics. These topics for research were chosen in consultation with the EAC Standards Board and Board of Advisors. Voting fraud and voter intimidation are topics that the EAC as well as its advisory boards felt were important to study to help improve the administration of elections for federal office.

italics
EAC began this study with the intention of identifying a common understanding of voting fraud and voter intimidation and devising a plan for a comprehensive study of these issues. The initial study was not intended to be a comprehensive review of existing voting fraud and voter intimidation actions, laws, or prosecutions. To conduct that type of extensive research, a basic understanding had to first be established regarding what is commonly referred to as voting fraud and voter intimidation. Once that understanding was reached, a definition had to be crafted to refine and in some cases limit the scope of what reasonably can be researched and studied as evidence of voting fraud and voter intimidation. That definition will serve as the basis for recommending a plan for a comprehensive study of the area.

To accomplish these tasks, EAC employed two consultants, Job Serebrov and Tova Wang,¹ who worked with EAC staff and interns to conduct the research that forms the basis of this report. The consultants were chosen based upon their experience with the topic and the need to assure a bipartisan representation in this study. The consultants and EAC staff were charged with (1) researching the current state of information on the topic

¹ Biographies for Job Serebrov and Tova Wang, the two consultants hired by EAC, are attached as Appendix "1".



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of voting fraud and voter intimidation; (2) developing a uniform definition of voting fraud and voter intimidation; and (3) proposing recommended strategies for researching this subject.

EAC consultants reviewed existing studies, articles, reports and case law on voting fraud and intimidation and conducted interviews with experts in the field. EAC consultants and staff then presented their initial findings to a working group that provided feedback. The working group participants were:

The Honorable Todd Rokita

Indiana Secretary of State
Member, EAC Standards Board and the
Executive Board of the Standards Board

Kathy Rogers

Georgia Director of Elections, Office of
the Secretary of State
Member, EAC Standards Board

J.R. Perez

Guadalupe County Elections
Administrator, Texas

Barbara Arnwine

Executive Director, Lawyers Committee
for Civil Rights under Law
Leader of Election Protection Coalition

Benjamin L. Ginsberg

Partner, Patton Boggs LLP
Counsel to National Republican
Campaign Committees and Republican
candidates

Robert Bauer

Chair of the Political Law Practice at the
law firm of Perkins Coie, District of
Columbia
National Counsel for Voter Protection,
Democratic National Committee

Mark (Thor) Hearne II

Partner-Member, Lathrop & Gage, St
Louis, Missouri
National Counsel to the American
Center for Voting Rights

Barry Weinberg

Former Deputy Chief and Acting Chief,
Voting Section, Civil Rights Division,
U.S. Department of Justice

Technical Advisor:

Craig Donsanto

Director, Election Crimes Branch, U.S.
Department of Justice

Throughout the process, EAC staff assisted the consultants by providing statutes and cases on this subject as well as supervision on the direction, scope and product of this research.

The consultants drafted a report for EAC that included their summaries of relevant cases, studies and reports on voting fraud and voter intimidation as well as summaries of the interviews that they conducted. The draft report also provided a definition of voting fraud and intimidation and made certain recommendations developed by the consultants



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or by the working group on how to pursue further study of this subject. This document was vetted and edited by EAC staff to produce this final report.

EXISTING INFORMATION ABOUT FRAUD AND INTIMIDATION

To begin our study of voting fraud and voter intimidation, EAC consultants reviewed the current body of information on voting fraud and voter intimidation. The information available about these issues comes largely from a very limited body of reports, articles, and books. There are volumes of case law and statutes in the various states that also impact our understanding of what actions or inactions are legally considered fraud or intimidation. Last, there is anecdotal information available through media reports and interviews with persons who have administered elections, prosecuted fraud, and studied these problems. All of these resources were used by EAC consultants to provide an introductory look at the available knowledge of voting fraud and voter intimidation.

Reports and Studies of Voting fraud and Intimidation

Over the years, there ^{has} been a number of studies conducted and reports published about voting fraud and voter intimidation. EAC reviewed many of these studies and reports to develop a base-line understanding of the information that is currently available about voting fraud and voter intimidation. EAC consultants reviewed the following articles, reports and books, summaries of which are available in Appendix "2":

Articles and Reports

- People for the American Way and the NAACP, "The Long Shadow of Jim Crow," December 6, 2004.
- Laughlin McDonald, "The New Poll Tax," *The American Prospect* vol. 13 no. 23, December 30, 2002.
- Wisconsin Legislative Audit Bureau, "An Evaluation: Voter Registration Elections Board" Report 05-12, September, 2005.
- Milwaukee Police Department, Milwaukee County District Attorney's Office, Federal Bureau of Investigation, United States Attorney's Office "Preliminary Findings of Joint Task Force Investigating Possible Election Fraud," May 10, 2005.
- National Commission on Federal Election Reform, "Building Confidence in U.S. Elections," Center for Democracy and Election Management, American University, September 2005.



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- The Brennan Center for Justice at NYU School of Law and Spencer Overton, Commissioner and Law Professor at George Washington University School of Law "Response to the Report of the 2005 Commission on Federal Election Reform," September 19, 2005.
- Chandler Davidson, Tanya Dunlap, Gale Kenny, and Benjamin Wise, "Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression – or Both?" A Report to the Center for Voting Rights & Protection, September, 2004.
- Alec Ewald, "A Crazy Quilt of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law," The Sentencing Project, November 2005.
- American Center for Voting Rights "Vote Fraud, Intimidation and Suppression in the 2004 Presidential Election," August 2, 2005.
- The Advancement Project, "America's Modern Poll Tax: How Structural Disenfranchisement Erodes Democracy" November 7, 2001
- The Brennan Center and Professor Michael McDonald "Analysis of the September 15, 2005 Voting fraud Report Submitted to the New Jersey Attorney General," The Brennan Center for Justice at NYU School of Law, December 2005.
- Democratic National Committee, "Democracy at Risk: The November 2004 Election in Ohio," DNC Services Corporation, 2005
- Public Integrity Section, Criminal Division, United States Department of Justice, "Report to Congress on the Activities and Operations of the Public Integrity Section for 2002."
- Public Integrity Section, Criminal Division, United States Department of Justice, "Report to Congress on the Activities and Operations of the Public Integrity Section for 2003."
- Public Integrity Section, Criminal Division, United States Department of Justice, "Report to Congress on the Activities and Operations of the Public Integrity Section for 2004."



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- Craig Donsanto, "The Federal Crime of Election Fraud," Public Integrity Section, Department of Justice, prepared for Democracy.Ru, n.d., at http://www.democracy.ru/english/library/international/eng_1999-11.html
- People for the American Way, Election Protection 2004, Election Protection Coalition, at <http://www.electionprotection2004.org/edaynews.htm>
- Craig Donsanto, "Prosecution of Electoral Fraud under United State Federal Law," *IFES Political Finance White Paper Series*, IFES, 2006.
- General Accounting Office, "Elections: Views of Selected Local Election Officials on Managing Voter Registration and Ensuring Eligible Citizens Can Vote," Report to Congressional Requesters, September 2005.
- Lori Minnite and David Callahan, "Securing the Vote: An Analysis of Election Fraud," Demos: A Network of Ideas and Action, 2003.
- People for the American Way, NAACP, Lawyers Committee for Civil Rights, "Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections," December 2004.

Books

- John Fund, *Stealing Elections: How Voting fraud Threatens Our Democracy*, Encounter Books, 2004.
- Andrew Gumbel, *Steal this Vote: Dirty Elections and the Rotten History of Democracy in American*, Nation Books, 2005.
- Tracy Campbell, *Deliver the Vote: A History of Election Fraud, An American Political Tradition – 1742-2004*, Carroll & Graf Publishers, 2005.
- David E. Johnson and Jonny R. Johnson, *A Funny Thing Happened on the Way to the White House: Foolhardiness, Folly, and Fraud in the Presidential Elections, from Andrew Jackson to George W. Bush*, Taylor Trade Publishing, 2004.
- Mark Crispin Miller, *Fooled Again*, Basic Books, 2005.



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During our review of these documents, we learned a great deal about the type of research that has been conducted in the past concerning voting fraud and voter intimidation. None of the studies or reports was based on a comprehensive, nationwide study, survey or review of all allegations, prosecutions or convictions of state or federal crimes related to voting fraud or voter intimidation in the United States. Most reports focused on a limited number of case studies or instances of alleged voting fraud or voter intimidation. For example, "Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections," a report produced by the People for the American Way, focused exclusively on citizen reports of fraud or intimidation to the Election Protection program during the 2004 Presidential election. Similarly, reports produced annually by the Department of Justice, Public Integrity Division, deal exclusively with crimes reported to and prosecuted by the United States Attorneys and/or the Department of Justice through the Public Integrity Section.

It is also apparent from a review of these articles and books that there is no consensus on the pervasiveness of voting fraud and voter intimidation. Some reports, such as "Building Confidence in U.S. Elections," suggest that there is little or no evidence of extensive fraud in U.S. elections or of multiple voting. This conflicts directly with other reports, such as the "Preliminary Findings of Joint Task Force Investigating Possible Election Fraud," produced by the Milwaukee Police Department, Milwaukee County District Attorney's Office, FBI and U.S. Attorney's Office. That report cited evidence of more than 100 individual instances of suspected double-voting, voting in the name of persons who likely did not vote, and/or voting using a name believed to be fake.

Voter intimidation is also a topic of some debate because there is little agreement concerning what constitutes actionable voter intimidation. Some studies and reports cover only intimidation that involves physical or financial threats, while others cover non-criminal intimidation, including legal practices that allegedly cause vote suppression.

One point of agreement is that absentee voting and voter registration by nongovernmental groups create opportunities for fraud. For example, a number of studies cited circumstances in which voter registration drives have falsified voter registration applications or have destroyed voter registration applications of persons affiliated with a certain political party. Others conclude that paying persons per voter registration application creates the opportunity and perhaps the incentive for fraud.

Interviews with Experts

In addition to reviewing prior studies and reports on voting fraud and intimidation, EAC consultants interviewed a number of persons regarding their experiences and research of voting fraud and voter intimidation. Persons interviewed included:



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Wade Henderson
Executive Director,
Leadership Conference for Civil Rights

Wendy Weiser
Deputy Director,
Democracy Program, The Brennan
Center

William Groth
Attorney for the plaintiffs in the Indiana
voter identification litigation

Lori Minnite
Barnard College, Columbia University

Neil Bradley
ACLU Voting Rights Project

Pat Rogers
Attorney, New Mexico

Nina Perales
Counsel,
Mexican American Legal Defense and
Education Fund

Rebecca Vigil-Giron
Secretary of State, New Mexico

Sarah Ball Johnson
Executive Director,
State Board of Elections, Kentucky

Stephen Ansolobhere
Massachusetts Institute of Technology

Chandler Davidson
Rice University

Tracey Campbell
Author, *Deliver the Vote*

Douglas Webber
Assistant Attorney General, Indiana

Heather Dawn Thompson
Director of Government Relations,
National Congress of American Indians

Jason Torchinsky
Assistant General Counsel,
American Center for Voting Rights

Robin DeJarnette
Executive Director,
American Center for Voting Rights

Harry Van Sickle
Commissioner of Elections,
Pennsylvania

Tony Sirvello
Executive Director
International Association of Clerks,
Recorders, Election Officials and
Treasurers

Joseph Sandler
Counsel
Democratic National Committee

John Ravitz
Executive Director
New York City Board of Elections

Sharon Priest
Former Secretary of State, Arkansas

Kevin Kennedy
Executive Director
State Board of Elections, Wisconsin



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Evelyn Stratton
Justice
Supreme Court of Ohio

Craig Donsanto
Director, Public Integrity Section
U.S. Department of Justice

Joseph Rich
Former Director
Voting Section, Civil Rights Division
U.S. Department of Justice

John Tanner
Chief
Voting Section, Civil Rights Division
U.S. Department of Justice

These interviews in large part confirmed the conclusions that were gleaned from the articles, reports and books that were analyzed. For example, the interviewees largely agreed that absentee balloting is subject to the greatest proportion of fraudulent acts, followed by vote buying and voter registration fraud. They similarly pointed to voter registration drives by nongovernmental groups as a source of fraud, particularly when the workers are paid per registration. Many asserted that impersonation of voters is probably the least frequent type of fraud because it is the most likely type of fraud to be discovered, there are stiff penalties associated with this type of fraud, and it is an inefficient method of influencing an election.

Interviewees differed on what they believe constitutes actionable voter intimidation. Law enforcement and prosecutorial agencies tend to look to the criminal definitions of voter intimidation, which generally require some threat of physical or financial harm. On the other hand, voter rights advocates tended to point to activities such as challenger laws, voter identification laws, polling place locations, and distribution of voting machines as activities that can constitute voter intimidation.

Those interviewed also expressed opinions on the enforcement of voting fraud and voter intimidation laws. States have varying authorities to enforce these laws. In some states, enforcement is left to the county or district attorney, and in others enforcement is managed by the state's attorney general. Regardless, voting fraud and voter intimidation are difficult to prove and require resources and time that many local law enforcement and prosecutorial agencies do not have. Federal law enforcement and prosecutorial agencies have more time and resources but have limited jurisdiction and can only prosecute election crimes perpetrated in elections with a federal candidate on the ballot or perpetrated by a public official under the color of law. Those interviewed differed on the effectiveness of the current system of enforcement. Some allege that prosecutions are not sufficiently aggressive. Others feel that the current laws are sufficient for prosecuting fraud and intimidation.

A summary of each of the interviews conducted is attached as Appendix "3".



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Case Law and Statutes

Consultants reviewed more than 40,000 cases that were identified using a series of search terms related to voting fraud and voter intimidation. The majority of these cases came from courts of appeal. This is not surprising, since most cases that are publicly reported come from courts of appeal. Very few cases that are decided at the district court level are reported for public review.

Very few of the identified cases were applicable to this study. Of those that were applicable, no apparent thematic pattern emerged. However, it did seem that the greatest number of cases reported on fraud and intimidation have shifted from past patterns of stealing votes to present problems with voter registration, voter identification, the proper delivery and counting of absentee and overseas ballots, provisional voting, vote buying, and challenges to felon eligibility.

A listing of the cases reviewed in this study is attached as Appendix "4".

Media Reports

EAC consultants reviewed thousands of media reports concerning a wide variety of potential voting fraud or voter intimidation, including:

- absentee ballot fraud,
- voter registration fraud,
- voter intimidation and suppression,
- deceased voters on voter registration list and/or voting,
- multiple voting,
- felon voting,
- non-citizens voting,
- vote buying,
- deceptive practices, and
- fraud by election officials.

While these reports showed that there were a large number of allegations of voting fraud and voter intimidation, they provided much less information as to whether the allegations were ever formalized as complaints to law enforcement, whether charges were filed, whether prosecutions ensued, and whether any convictions were made. The media reports were enlightening as to the pervasiveness of complaints of fraud and intimidation throughout the country, the correlation between fraud allegations and the perception that the state was a "battleground" or "swing" state, and the fact that there were reports of almost all types of voting fraud and voter intimidation. However, these reports do not



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provide much data for analysis as to the number of complaints, charges and prosecutions of voting fraud and intimidation throughout the country.

DEFINITION OF ELECTION CRIMES

From our study of available information on voting fraud and voter intimidation, we have learned that these terms mean many things to many different people. These terms are used casually to refer to anything from vote buying to refusing to register a voter to falsifying voter registration applications. Upon further inspection, however, it is apparent that there is no common understanding or agreement of what constitutes "voting fraud" and "voter intimidation." Some think of voting fraud and voter intimidation only as criminal acts, while others include actions that may constitute civil wrongs, civil rights violations, and even legal activities. To arrive at a common definition and list of activities that can be studied, EAC assessed the appropriateness of the terminology that is currently in use and applied certain factors to limit the scope and reach of what can and will be studied by EAC in the future. As a result, EAC has adopted the use of the term "election crimes" for its future study.

Current Terminology

The phrase "voting fraud" is really a misnomer for a concept that is much broader. "Fraud" is a concept that connotes an intentional act of deception, which may constitute either a criminal act or civil tort depending upon the willfulness of the act.

Fraud, n. 1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. • Fraud is usu[ally] a tort, but in some cases (esp. when the conduct is willful) it may be a crime.

Black's Law Dictionary, Eighth Edition, p. 685.

"Voting" is the act of casting votes to decide an issue or contest. Black's Law Dictionary, Eighth Edition, p. 1608. Using these terms to form a definition of "voting fraud," it means fraudulent or deceptive acts committed to influence the act of voting. Thus, a voter who intentionally impersonates another registered voter and attempts to vote for that person would be committing "voting fraud." Similarly, a person who knowingly provides false information to a voter about the location of the voter's polling place commits fraud on the voter.

The phrase "voting fraud" does not capture a myriad of other criminal acts that are related to elections which are not related to the act of voting and/or do not involve an act of deception. For example, "voting fraud" does not capture actions or willful inaction in the voter registration process. When an election official willfully and knowingly refuses



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to register to vote a legally eligible person it is a crime. This is a crime that involves neither the act of voting nor an act of deception.

To further complicate matters, the phrases "voting fraud" and "voter intimidation" are used to refer to actions or inactions that are criminal as well as those that are potentially civil wrongs and even those that are legal. Obviously, criminal acts and civil wrongs are pursued in a very different manner. Criminal acts are prosecuted by the local, state or federal government. Generally, civil wrongs are prosecuted by the individual who believes that they were harmed. In some cases, when civil rights are involved, the Civil Rights Division of the Department of Justice may become involved.

New Terminology

The goal of this study was to develop a common definition of what is generically referred to as "voting fraud" and "voter intimidation" that would serve as the basis for a future, comprehensive study of the existence of these problems. Because the current terminology has such a variety of applications and meanings, "voting fraud" and "voter intimidation" can be read to encompass almost any bad act associated with an election. Such broad terminology is not useful in setting the boundaries of a future study. A definition must set parameters for future study by applying limitations on what is included in the concepts to be studied. The current terminology applies no such limitations.

another word?

Thus, EAC has adopted the use of the phrase "election crimes" to limit the scope of its future study. This term captures all crimes related to the voter registration and voting processes and excludes civil wrongs and non-election related crimes. EAC adopted this definition because it better represents the spectrum of activities that we are able to and desire to study. In addition, we recognize that the resources, both financial and human capital, needed to study all "voting fraud" and "voter intimidation," including criminal acts, civil actions, as well as allegations of voter suppression through the use of legal election processes are well beyond the resources available to EAC. Finally, by limiting this definition to criminal acts, EAC can focus its study on a set of more readily measurable data. Criminal behavior is readily defined through state and federal statutes and is prosecuted by government agencies. This is not the case with civil matters. Civil actions can be prosecuted by individuals and/or government entities. Furthermore, what constitutes civil action is far less defined, subject to change, and can vary from case to case. A more complete discussion of the concept of "election crimes" follows along with a list of excluded actions.

activities that EAC does not define as



The Definition of an Election Crime for Purposes of this Study

Election crimes are intentional acts or willful failures to act, prohibited by state or federal law, that are designed to cause ineligible persons to participate in the election process; eligible persons to be excluded from the election process; ineligible votes to be cast in an election; eligible votes not to be cast or counted; or other interference with or invalidation of election results. Election crimes generally fall into one of four categories: acts of deception, acts of coercion, acts of damage or destruction, and failures or refusals to act.

Election crimes can be committed by voters, candidates, election officials, or any other members of the public who desire to criminally impact the result of an election. However, crimes that are based upon intentional or willful failure to act assume that a duty to act exists. Election officials have affirmative duties to act with regard to elections. By and large, other groups and individuals do not have such duties.

The victim of an election crime can be a voter, a group of voters, an election official, a candidate, or the public in general. Election crimes can occur during any stage of the election process, including but not limited to qualification of candidates; voter registration; campaigning; voting system preparation and programming; voting either early, absentee, or on election day; vote tabulation; recounts; and recalls.

The following are examples of activities that may constitute election crimes. This list is not intended to be exhaustive, but is representative of what states and the federal government consider criminal activity related to elections.

Acts of Deception

- Knowingly causing to be mailed or distributed, or knowingly mailing or distributing, literature that includes false information about the voter's precinct or polling place, the date and time of the election or a candidate;
- Possessing an official ballot outside the voting location, unless the person is an election official or other person authorized by law or local ordinance to possess a ballot outside of the polling location;
- Making or knowingly possessing a counterfeit of an official election ballot;
- Signing a name other than his/her own to a petition proposing an initiative, referendum, recall, or nomination of a candidate for office;
- Knowingly signing more than once for the proposition, question, or candidate in one election;
- Signing a petition proposing an initiative or referendum when the signer is not a qualified voter.
- Voting or attempting to vote in the name of another person;
- Voting or attempting to vote more than once during the same election;



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- Intentionally making a false affidavit, swearing falsely, or falsely affirming under an oath required by a statute regarding their voting status, including when registering to vote, requesting an absentee ballot or presenting to vote in person;
- Registering to vote without being entitled to register;
- Knowingly making a materially false statement on an application for voter registration or re-registration; and
- Voting or attempting to vote in an election after being disqualified or when the person knows that he/she is not eligible to vote.

Acts of Coercion

- Using, threatening to use, or causing ^{the use of?} [to be used] force, coercion, violence, restraint, or inflicting, threatening to inflict, or causing to be inflicted damage, harm, or loss, upon or against another person to induce or compel that person to vote or refrain from voting or to register or refrain from registering to vote;
- Knowingly paying, offering to pay, or causing to be paid money or other thing of value to a person to vote or refrain from voting for a candidate or for or against an election proposition or question;
- Knowingly soliciting or encouraging a person who is not qualified to vote in an election;
- Knowingly challenging a person's right to vote without probable cause or on fraudulent grounds, or engaging in mass, indiscriminate, and groundless challenging of voters solely for the purpose of preventing voter from voting or to delay the process of voting; ^{the}
- As an employer, attempting by coercion, intimidation, threats to discharge or to lessen the remuneration of an employee, to influence his/her vote in any election, or who requires or demands an examination or inspection by himself/herself or another of an employee's ballot;
- Soliciting, accepting, or agreeing to accept money or other valuable thing ⁱⁿ exchange for signing or refraining from signing a petition proposing an initiative;
- Inducing or attempting to induce an election official to fail in the official's duty by force, threat, intimidation, or offers of reward;
- Directly or through any other person advancing, paying, soliciting, or receiving or causing to be advanced, paid, solicited, or received, any money or other valuable consideration to or for the use of any person in order to induce a person not to become or to withdraw as a candidate for public office; and
- Soliciting, accepting, or agreeing to accept money or other thing ^{of} value in exchange for registering to vote.



Acts of Damage or Destruction

- Destroying completed voter registration applications;
- Removing or destroying any of the supplies or other conveniences placed in the voting booths or compartments;
- Removing, tearing down, or defacing election materials, instructions or ballots;
- Fraudulently altering or changing the vote of any elector, by which such elector is prevented from voting as the person intended;
- Knowingly removing, altering, defacing or covering any political sign of any candidate for public office for a prescribed period prior to and following the election;
- Intentionally changing, attempting to change, or causing to be changed an official election document including ballots, tallies, and returns; and
- Intentionally delaying, attempting to delay, or causing to be delayed the sending of certificate, register, ballots, or other materials whether original or duplicate, required to be sent by jurisdictional law.

Failure or Refusal to Act

- Intentionally failing to perform an election duty, or knowingly committing an unauthorized act with the intent to effect the election;
- Knowingly permitting, making, or attempting to make a false count of election returns;
- Intentionally concealing, withholding, or destroying election returns or attempts to do so;
- Marking a ballot by folding or physically altering the ballot so as to recognize the ballot at a later time;
- Attempting to learn or actually and unlawfully learning how a voter marked a ballot;
- Distributing or attempting to distribute election material knowing it to be fraudulent;
- Knowingly refusing to register a person who is entitled to register under the rules of that jurisdiction;
- Knowingly removing the eligibility status of a voter who is eligible to vote; and
- Knowingly refusing to allow an eligible voter to cast his/her ballot.

What is not an Election Crime for Purposes of this Study

There are some actions or inactions that may constitute crimes or civil wrongs that we do not include in our definition of "election crimes." All criminal or civil violations related to campaign finance contribution limitations, prohibitions, and reporting either at the state or federal level are not "election crimes" for purposes of this study and any future



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study conducted by EAC. Similarly, criminal acts that are unrelated to elections, voting, or voter registration are not "election crimes," even when those offenses occur in a polling place, voter registration office, or a candidate's office or appearance. For example, an assault or battery that results from a fight in a polling place or at a candidate's office is not an election crime. Last, violations of ethical provisions and the Hatch Act are not "election crimes." Similarly, civil or other wrongs that do not rise to the level of criminal activity (i.e., a misdemeanor, relative felony or felony) are not "election crimes."

RECOMMENDATIONS ON HOW TO STUDY ELECTION CRIMES

As a part of its study, EAC sought recommendations on ways that EAC can research the existence of election crimes. EAC consultants, the working groups and some of the persons interviewed as a part of this study provided the following recommendations.

Recommendation 1: Conduct More Interviews

Future activity in this area should include conducting additional interviews. In particular, more election officials from all levels of government, parts of the country, and political parties should be interviewed. It would also be especially beneficial to talk to law enforcement officials, specifically federal District Election Officers ("DEOs") and local district attorneys, as well as civil and criminal defense attorneys.

Recommendation 2: Follow Up on Media Research

The media search conducted for this phase of the research was based on a list of search terms agreed upon by EAC consultants. Thousands of articles were reviewed and hundreds analyzed. Many of the articles contained allegations of fraud or intimidation. Similarly, some of the articles contained information about investigations into such activities or even charges brought. Additional media research should be conducted to determine what, if any, resolutions or further activity there was in each case.

Recommendation 3: Follow Up on Allegations Found in Literature Review

Many of the allegations made in the reports and books that were analyzed and summarized by EAC consultants were not substantiated and were ~~certainly~~ limited by the date of publication of those pieces. Despite this, such reports and books are frequently cited by various interested parties as evidence of fraud or intimidation. Further research should include follow up on the allegations ~~discovered~~ in the literature review.

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